No. 12044

United States

Court of Appeals

for the Ninth Circuit

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellant,

vs.

WALTER McDONALD,

Appellee.

Transcript of Record

Appeal from the District Court of the United States for the Northern District of California, Southern Division

Typo Press, 398 Pacific, San Francisco 11-1-48—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY,

United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,

Attorney for Respondent and Petitioner.

WALTER McDONALD,

Box No. P.M.B. 602,
Alcatraz, California,

In Propria Persona. [1*]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the Northern District of California, Southern Division

No. 28210

WALTER McDONALD,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

The petition for Walter McDonald respectfully shows:

That he is illegally restrained of his lawful liberty by color of authority of the United States and in the immediate custody of E. B. Swope, warden of the United States Penitentiary, Alcatraz, California, which penitentiary is within the legal jurisdiction of this District Court.

STATEMENT OF FACT

Petitioner, on May 4, 1938, in the United States District Court for the Eastern District of Michigan, was indicted on six counts for violation of Title 12, Section 588 B, Subsections (a) and (b); all of which comprise a single charge of bank-robbery.

On January 25, 1939, petitioner was found guilty by jury. On January 26, 1939, he was sentenced

to the penitentiary in the custody of the Attorney General of the United States and to this day stands committed.

CONTENTION OF PETITIONER

That petitioner was deprived of his constitutional right to the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner is falsely, erroneously and unjustly charged with a very serious offense of which he is wholly innocent. Being ignorant in law and, during his trial, deprived of his constitutional right to the effective assistance of counsel, which necessarily precluded the [2] right of appeal, petitioner was unable to establish his innocence.

Petitioner was notified by the trial court on Monday evening, January 23, 1939, that his trial would start the following morning. He had no funds to employ counsel and the court would not appoint counsel; in support of which is an authentic copy of a letter incorporated within a sworn deposition by Honorable Judge Moinet, on page 13 thereof, attached hereto, made a part hereof, and marked petitioner's Exhibit A. (This was petitioner's first request to the court for counsel.)

The exhibits in cause Number 24885-S, now in the files of the clerk of this court, labeled depositions and marked Exhibits A, B and C, are adopted in this cause by reference and are to be incorporated and made a part hereof as though completely set forth herein and shall be designated and reference made thereto as Exhibits A, B, and C.

On the evening preceding his trial petitioner learned that one attorney George F. Curran had filed with the court clerk his notice of appearance as defense counsel on January 10, 1939. This was without the consent, knowledge or notification of petitioner; in support of which is an authentic copy of a sworn deposition by Attorney George F. Curran, at line 30, on page 14 thereof, attached hereto, made a part hereof, and marked petitioner's Exhibit C.

Petitioner thought at the time that the court had appointed this attorney to defend him. Petitioner promptly requested him to withdraw from the case. This, the said attorney refused to do. Exhibit C, page 15, line 12.

The following morning January 24, 1939, when court convened Atty. Curran made a motion for continuance so that he could prepare a defense; for at no time preceding the trial date has this said attorney notified or consulted with petitioner in an effort to prepare a proper structure of defense. This motion the court denied. Exhibit C, page 15, lines 21 to 26.

Whereupon petitioner arose and personally requested Judge Moinet in open court for other and unprejudiced counsel. Exhibit A, page 3, line 24; Exhibit C, page 7, line 24; Exhibit C, page 20, line 28. (This [3] was petitioner's second request to the court for counsel.) Petitioner explained that this said attorney, at that instant was awaiting trial before the grievance committee of the Michigan State Bar for professional misconduct; ExB)

and that petitioner was the prosecuting witness. Exhibit C, page 14, line 12.

This urgent request the court denied, Exhibit C, page 15, line 17, compelling petitioner to proceed immediately to trial with his personal enemy simulating a defender and without having made any preparation whatsoever for defense. Exhibit C, page 15, lines 21 to 26.

CONCLUSION

Petitioner having been denied the assistance of counsel for his defense in contravention of Amendment Six, United States Constitution, the trial court lost legal jurisdiction of said cause by reason thereof, during the proceedings to pronounce judgment. Therefore the judgment of conviction is invalid, void and of no effect, and petitioner is now unlawfully deprived of his liberty.

ITEM

This is the second application by petitioner for a writ of habeas corpus in this court wherein the same allegation is put in issue. On the first application the Honorable A. J. St. Sure granted petitioner's discharge without issuing the writ. (62 Federal Supplement 830.) The ninth Circuit Court of Appeals reversed. (157 F. (2) 275.) Hence, in effect and through no error of the District Court, petitioner has been denied a petition for a writ of habeas corpus without a hearing wherein a question of fact was raised, in violation of the rigid rule promulgated by the United States Supreme Court in Walker v. Johnston, 312 U.S. 275.

PRAYER

Wherefore, petitioner prays this Honorable Court to command Warden E. B. Swope, respondent herein, to discharge petitioner from further unlawful custody.

/s/ WALTER McDONALD,
Petitioner Pro se. [4]

AFFIDAVIT OF VERIFICATION

Personally appeared before me Walter McDonald who, after being first duly sworn, upon his oath deposes and says: that he is the petitioner in the above entitled cause; that he has read the contents thereof; and that they are true to the best of his knowledge and belief.

WALTER McDONALD,
Affiant and Petitioner.

Subscribed and sworn to before me this 6th day of July, 1948.

P. J. MADIGAN,
Associate Warden, United States Penitentiary, Alcatraz, California.

Warden-Associate Warden authorized by Act of February 11, 1938, to administer oaths.

Records at U. S. Penitentiary Alcatraz, indicate that Walter McDonald is a citizen of the United States.

[Endorsed]: Filed July 24, 1948. [5]

Ninth Judicial Circuit of the United States

William Denman, Circuit Judge of the Ninth Circuit.

WALTER McDONALD,

Petitioner,

vs.

E. B. SWOPE. Warden, United States Penitentiary, Alcatraz, California,

Respondent.

ORDER TO SHOW CAUSE

The petitioner having filed with me his petition for a writ of habeas corpus, and it appearing that he has filed a prior petition with the United States District Court for the Northern District of California, which petition was ultimately denied, and it appearing that the contentions of the petition to me require further consideration:

It is hereby ordered that E. B. Swope, Warden of the United States Penitentiary at Alcatraz Island, State of California, appear before me at 316 Post Office Building, San Francisco, on the 14th day of July, 1948, at the hour of 10 o'clock a.m. of that day, to show cause, if any he has, why a writ of habeas corpus should not be issued herein, as prayed for, and that a copy of this order be served upon the Warden of the United States Penitentiary, at Alcatraz Island, State of California, by mail and that a copy of the petition and this

order be served upon the United States Attorney for this District, his representative herein, and that the Warden have with him Walter McDonald, there to present his case in propria persona.

WILLIAM DENMAN,
United States District Judge.

San Francisco, July 9, 1948.

[Endorsed]: Filed July 24, 1948. [6]

United States District Court, Southern Division, Northern District of California

HABEAS CORPUS

The President of the United States of America

To: E. B. Swope, Warden, United States Penitentiary, Alcatraz, California

Greetings:

You are hereby commanded, that the body of Walter McDonald by you restrained of his liberty, as it is said detained by whatsoever names the said Walter McDonald may be detained, together with the day and cause of being taken and detained, you have before the Honorable William Denman, Judge of the United States Circuit Court in and for the Ninth Judicial Circuit, at his Chambers, Room 316, Post Office Building, in the City of San

Francisco, Calif., at 11 o'clock a.m., on the 20th day of July, 1948, then and there to do, submit to and receive whatsoever the said Judge shall then and there consider in that behalf; and have you then and there this writ.

Witness: the Honorable William Denman, United States Circuit Judge for the Ninth Judicial Circuit, at San Francisco, California, this 14th day of July, A.D. 1948.

(Seal) C. W. CALBREATH,
Clerk.

[Endorsed]: Filed July 15, 1948.

UNITED STATES MARSHAL'S RETURN

Northern District of California—ss:

Received the within writ this 14th day of July, 1948, and executed same on July 15th, 1948 by telephoning to and talking with Carl Sundstrom (Record Clerk at Alcatraz) who state Warden Swope would accept mail service . . . thereafter I mailed on 7-15-48 the original copy of this writ to Warden Swope at Alcatraz penitentiary.

GEORGE VICE,
U. S. Marshal,

By /s/ JAMES F. EAGAN,
Deputy Marshal. [7]

Ninth Judicial Circuit of the United States

William Denman, Circuit Judge of the Ninth Circuit.

WALTER McDONALD,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

RETURN TO WRIT OF HABEAS CORPUS

Comes now E. B. Swope, Warden of the United States Penitentiary, Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for return to writ of habeas corpus, heretofore issued herein, respectfully shows:

I.

That the person hereinafter called "the petitioner", on whose behalf the petition for writ of habeas corpus was filed is detained by the respondent, E. B. Swope, as warden of the United States Penitentiary at Alcatraz Island, California, under and by virtue of the judgment and sentence duly and regularly made and entered by the District Court of the United States for the Eastern District of Michigan, Southern Division, hereinafter called the "trial court", in the case of United States of America vs. Walter McDonald, et al., Criminal No. 24742, on October 21, 1943, as modified by the Circuit Court of Appeals for the Sixth Circuit in its

opinion of January 10, 1944, reported in 139 F. (2d) 939 and transfer order dated May 15, 1943, issued at Washington, D. C. by direction of the Attorney General of the United States of America and signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

II.

That the trial Court had jurisdiction over petitioner and the offenses alleged in the indictment returned against him in said criminal cause number 24742;

III.

That respondent is informed and believes and further alleges that petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial Court and that petitioner was in fact effectively, efficiently and ably represented by counsel during all stages of the proceedings before the trial court;

IV.

That respondent is informed and believes and further alleges that petitioner was not deprived of any of his constitutional rights before the trial court;

V.

That the return to order to show cause heretofore filed herein is hereby referred to and incorporated herein as though set forth in full;

VI.

That in addition to the records referred to by respondent in his return to order to show cause,

which are also incorporated herein as though set forth in full, respondent also refers to and incorporates herein as though set forth in full, transcript of record on appeal before the United States Circuit Court of Appeals for the Sixth Circuit, No. 10581, in the case entitled "Walter McDonald, Appellant, v United States of America, Appellee", District Court Criminal Docket No. 24742, on appeal from an order entered on May 15, 1947, in the United States District Court for the Eastern District of Michigan, Southern Division, denying the motion of appellant to vacate judgment of conviction, together with per curiam opinion of the United States Circuit Court of Appeals for the Sixth Circuit affirming the judgment of the District Court, filed March 1, 1948. (.... F. (2d) ....).

Wherefore respondent prays that the petition for writ of habeas [9] corpus be denied and that the writ of habeas corpus, heretofore issued, be discharged.

Dated: July 20, 1948.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney, Attorneys for Respondent.

[Endorsed]: Filed July 24, 1948. [10]

[Title of U. S. Court of Appeals and Cause.]

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Your petitioner represents that

(1) On October 5, 1939, in the Eastern District of Michigan, he employed on a paid retainer one George F. Curran as his attorney to secure the "speedy" trial guaranteed him by the Sixth Amendment of the charges of an indictment returned in the United States District Court of that district on May 4, 1938, over five months prior to the employment of Attorney Curran. The indictment contained six counts charging violations of Title 12, Section 588 (6) subsections (a) and (b) respecting the robbery of the Federal Reserve Bank.

(2) Attorney Curran agreed to secure immediately a writ of habeas corpus to procure such a prompt trial so delayed for over five months, but failed to apply for the same at any time.

(3) On November 19, 1938, petitioner filed with the grievance committee of the Michigan State Bar Association his charges against Attorney Curran for malpractice in accepting a retainer to procure such prompt trial and failing to apply for such a writ of habeas corpus.

(4) At the times hereafter mentioned these charges remained unanswered before and undecided by the Michigan State Bar Association during all such time and particularly during petitioner's trial upon the charges of the indictment, in which Attor-

ney Curran acted as [11] attorney for petitioner, petitioner remained in hostility to Attorney Curran, as known by him, and justifiably assumed Attorney Curran was hostile to him by reason of petitioner's malpractice charge against him.

(5) It was apparent that if the trial were so conducted that petitioner were convicted, he would not be free to and could not conduct efficiently his malpractice proceeding against Attorney Curran. It was also apparent that if petitioner were found guilty, it would be urged as a justification of Attorney Curran's failure to secure a prompt trial. Nevertheless, Attorney Curran procured himself to become petitioner's attorney and acted as such attorney at the trial, in the manner hereafter described.

(6) Thereafter and two months after petitioner filed such charges with the Michigan State Bar Association and on January 10, 1939, Attorney Curran, without petitioner's knowledge or consent, entered his appearance as attorney for petitioner for petitioner's trial on the above indictment, which was set for January 24, 1939.

(7) It was not until the evening of January 23, 1939, that petitioner learned it was the purpose of Attorney Curran to be his attorney, despite the petitioner's charge of malpractice against him. On that evening, in the jail in the City of Detroit, Michigan, while conferring with another attorney, one Fitzgerald, for his defense at the trial on the following morning, Attorney Curran joined them and stated he was the petitioner's attorney. Thereupon Attorney Fitzgerald withdrew.

(8) Thereafter petitioner demanded of Attorney Curran that he withdraw as petitioner's attorney. Attorney Curran refused to withdraw stating to petitioner that he could not and would not ask to be discharged from the case but that, if petitioner wanted, he, the petitioner, could advise the court of Curran's refusal to withdraw.

(9) At the trial on January 24, 1939, after the jury was impaneled, petitioner advised the court of his disagreement with Attorney Curran and asked for the appointment of some other attorney. Thereupon, without asking the nature of the disagreement, the court refused to release [12] Attorney Curran and denied petitioner another attorney.

(10) The petitioner is a layman with no training at law and that it was the duty of the judge to inquire fully into the nature of the disagreement between petitioner, which would have disclosed the conflicting interests of Curran, accused of malpractice, and petitioner, his accuser.

As said in Glasser v. United States, 315 U.S. 60, 71, 75, a case of another kind of conflicting interest between attorney and client, though not as violent as here, where it was apparent that the attorney's interest might conflict with his client's, "The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances to hold Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart (Glasser's Attorney) as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. . . . Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interest which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. . . ."

(11) Though listening to petitioner's statement to the court of petitioner's disagreement with Curran and his request of another attorney, and though knowing petitioner to be a layman, Attorney Curran did not advise the court then or at any time that his client was maintaining a malpractice proceeding against him and had previously asked him to withdraw and that he had refused to do so. [13]

In these circumstances, it was a gross violation of Attorney Curran's duty to his layman client not to advise the court of petitioner's malpractice proceeding against him. Attorney Curran, an officer of the court, was a part of the court. By his failure as such officer so to act and by the failure of the trial judge to act as above described, they prevented the creation of a court in which peti-

tioner could have such a trial as is required by the Sixth Amendment of the Constitution.

By such failure so to creat such a constitutional court, the acting court lacked jurisdiction to proceed with the trial of petitioner for, as said in said in Johnson v. Zerbst, 304 U.S. 458, 468, "If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost in the course of the proceedings' due to failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused to is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. A judge of the United States—to whom a petition for habeas corpus is addressed—should be alert to examine 'the facts for himself when if true as alleged they make the trial absolutely void.'" (Emphasis supplied)

(12) So represented, the trial proceeded and the jury returned a verdict of guilty against petitioner on all the charges of the indictment. At the imposition of the sentence by the court, Attorney Cur-

ran did not attend there to represent petitioner. The court, on January 25, 1939, imposed a sentence in the absence of Attorney Curran of 35 years in the penitentiary, applying it generally to all six counts of the indictment. Thereafter, in June, 1943, the petitioner moved the court to set aside the sentence. The United States Attorney [14] conceded that he could be sentenced on but one of the counts of the indictment and that the sentence of 35 years was void. The court, on October 21, 1943, set aside that sentence and resentenced petitioner to 25 years in the penitentiary. McDonald v. Moinet, 139 F. 2d 939. The Warden now holds petitioner under the sentence for 25 years imposed on October 21, 1943.

(13) Attorney Curran, though believing petitioner had grounds for an appeal from the sentence of January 25, 1939, because of errors of law at the trial, took no action whatsoever to appeal from the judgment, which appeal he or some other counsel could prosecute for petitioner. For his failure so to act, Attorney Curran stated as his reason that no one provided him with a fee for procuring an appeal.

(14) Petitioner, imprisoned by reason of the sentence so procured, was unable to conduct his proceeding against Attorney Curran before the Michigan State Bar Association. Thereafter, Attorney Curran filed his statement in that proceeding and the charges were dismissed.

(15) Petitioner has heretofore filed a petition for a writ of habeas corpus in the Northern Dis-

trict of California which was ordered dismissed because it failed to state a cause of action. The identity of this case, as now pleaded in all essential features with Judge Denman's decision in Wright v. Johnston, 77 Fed. Supp. 687, makes a light burden in its consideration and is a special reason for asking him to consider it. Since it is the law of this circuit that individual judges of the District Court of the Northern District of California are not required to consider such petitions addressed to them and they file such petitions with the court to be considered by the court (Burrell v. Johnston, 146 F2d 230), the requirements of Bowen v. Johnston, 51 Fed. Supp. 717, of the prior filing of petitions to the individual judges are now applicable.

Wherefore, your petitioner prays that Circuit Judge William Denman order the issuance of a writ of habeas corpus to the above Warden, commanding the Warden to produce the body of petitioner before [15] Judge Denman, on July 20, 1948, at 10 o'clock a.m., at his chambers, 316 Post Office Building, San Francisco, together with a return stating the day and cause of petitioner being taken and restrained by the Warden.

WALTER McDONALD,
Petitioner.

(Verification.)

[Endorsed]: Filed July 24, 1948. [16]

In the Ninth Judicial Circuit

Before, William Denman, United States Circuit Judge of that Circuit.

WALTER McDONALD,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

ORDER

Misc. 132

To the Clerk of the United States District Court for the Northern District of California:

It appearing from the amended petition of Walter McDonald for the writ of habeas corpus, the order to show cause why the writ should not issue, the return to the order and the traverse thereof by the petition accepted as traverse by the respondent, that due cause exists for the issuance of the writ to the respondent Warden, the Clerk of the United States District Court for the Northern District of California is ordered forthwith to issue the writ of habeas corpus addressed to the respondent Warden, ordering the Warden to produce the body of the petitioner, Walter McDonald, before me in my chambers, No. 316 Post Office Building, San Francisco, at the hour of 11 o'clock a.m. on Tuesday, July 20, 1948.

WILLIAM DENMAN,
United States Circuit Judge.

Dated: July 14, 1948.

[Endorsed]: Filed July 24, 1948. [17]

[Title of U. S. Court of Appeals and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now E. B. Swope, Warden of the United States Penitentiary, Alcatraz, California, through Frank J. Hennessy, United States Attorney for the Northern District of California, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That the person hereinafter called "the petitioner", on whose behalf the petition for writ of habeas corpus was filed, is detained by the respondent E. B. Swope, as Warden of the United States Penitentiary at Alcatraz Island, California, under and by virtue of the judgment and sentence duly and regularly made and entered by the District Court of the United States for the Eastern District of Michigan, Southern Division, hereinafter called the "trial Court", in the case of United States of America vs. Walter McDonald, et al., Criminal No. 24742, on October 21, 1943, as modified by the Circuit Court of Appeals for the Sixth Circuit in its opinion of January 10, 1944, reported in 139 F. (2d) 939 and transfer order dated May 15. 1943, issued at Washington, [18] D.C. by direction of the Attorney General of the United States of America and signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice of the United States of America;

II.

That heretofore petitioner filed a petition for writ of habeas corpus before the District Court of the United States for the Northern District of California in case number 23414-S, which petition was denied; that on appeal the judgment of the lower Court was affirmed by the Circuit Court of Appeals for the Ninth Circuit in its opinion of April 2, 1945, reported in 149 F. (2d) 768; that the entire record of these proceedings is hereby referred to and incorporated herein as though set forth in full;

III.

That heretofore petitioner filed a petition for writ of habeas corpus in the District Court of the United States in case number 24885-S; that the said petition was granted and the petitioner remanded to the trial Court for further proceedings (62 F. Supp. 830); that the decision of the lower Court in case number 24885-S, reported in 62 F. Supp. 830, was appealed by the Government and on appeal the decision of the lower Court was reversed by the Circuit Court of Appeals for the Ninth Circuit in its opinion of August 30, 1946, reported in 157 F. (2d) 275, certiorari denied December 23, 1946, 329 U.S. 795; that the entire record of these proceedings is hereby referred to and incorporated herein as though set forth in full;

IV.

That heretofore and prior to his transfer to Alcatraz Island, California, by virtue of the aforesaid [19] transfer order dated May 15, 1943, petitioner filed a petition for writ of habeas corpus in

the District Court of the United States for the District of Kansas in the case of McDonald v. Hudspeth, Warden; that the said petition was denied and on appeal the judgment of the lower Court was affirmed by the Circuit Court of Appeals for the Tenth Circuit in its opinion of July 26, 1940, reported in 113 F. (2d) 984; that the entire record of these proceedings is hereby referred to and incorporated herein as though set forth in full;

V.

That heretofore and prior to his transfer to Alcatraz Island, California, by virtue of the aforesaid transfer order dated May 15, 1943, petitioner filed a petition for writ of habeas corpus in the District Court of the United States for the District of Kansas in the case of McDonald, et al. v. Hudspeth, Warden, which petition was denied and on appeal the judgment of the lower Court was affirmed by the Circuit Court of Appeals for the Tenth Circuit in its opinion of June 17, 1942, rehearing denied August 4, 1942, reported in 129 F. (2d) 196, certiarari denied, 317 U.S. 665; that the entire record of these proceedings is hereby referred to and incorporated herein as though set forth in full;

VI.

That the only issue cognizable in habeas corpus raised by the petitioner, to-wit, the alleged denial of the effective assistance of counsel, is similar to that raised and claimed by him in the habeas corpus proceedings set forth in paragraphs III, IV and V of this Return, set forth above. [20]

VII.

That in the habeas corpus proceedings referred to in paragraph II of this Return, above set forth, the Circuit Court of Appeals for the Ninth Circuit said in pertinent part as follows:

"In this (his fourth) habeas corpus proceeding, McDonald petitioned for the writ on the ground that his sentence was void because, at his (and Barnowski's) trial, he was denied the assistance of counsel for his defense. Attached to and made part of the petition were copies of three depositions—a deposition of District Judge Edward J. Moinet, who presided at the trial, a deposition of Assistant United States Attorney John W. Babcock, who represented McDonald and Barnowski, and a deposition of Attorney George F. Curran, who defended them. Instead of showing that McDonald was denied the assistance of counsel for his defense, the depositions (which were part of the petition) showed that there was no such denial. Thus it appeared from the petition itself that McDonald was not entitled to the writ. Hence the petition should have been denied.

McDonald relies on Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680. There the trial court, over Glasser's objection, appointed an attorney whom Glasser had employed for himself as attorney for Glasser's codefendant, whose interests conflicted with those of Glasser. In the case at bar, Attorney Curran was employed by both defendants (McDonald and Barnowski). No Attorney was appointed for either of them. It was

not claimed or suggested that their interests conflicted. Hence the Glasser case has no relevancy here."

157 F. (2d) 275, 276;

VIII.

That in the habeas corpus proceedings referred to in paragraph V of this Return, above set forth, the Circuit Court of Appeals for the Tenth Circuit stated in pertinent part as follows:

"The trial court found that petitioners were represented by Mr. Curran, competent counsel of their own choice, and that they were not denied the assistance of competent counsel for their defense; that McDonald did not state to Judge [21] Moinet the nature of his disagreement with Curran, did not ask for a continuance, and did not request that another counsel be appointed; that Judge Moinet gave McDonald full opportunity to state the nature of his disagreement, but that the only statement made was that McDonald had had some disagreement with Curran; that no request was made by petitioners or their counsel for process for witnesses; that at no time during the trial did petitioners make any complaint to the court respecting the conduct of their defense by Curran; that McDonald did not state to Judge Moinet that he had filed charges against Curran with the Michigan State Bar Association; that petitioners were each afforded a fair and impartial trial; and that considering the volume of business in the District Court of the United States for the Eastern District of Michigan they were not denied the right to a

speedy trial. These findings are fully supported by the evidence;"

129 F. (2d) 196, 197, 198.

IX.

That also referred to and incorporated herein as though set forth in full is the opinion of the Circuit Court of Appeals for the Sixth Circuit in the case of McDonald v. Moinet, (CCA-6), reported in 139 F. (2d) 939;

X.

That the respondent is informed and believes that petitioner's right to assistance of counsel was not denied him at the time of his appearance before the trial Court and that the petitioner was in fact effectively, efficiently and ably represented by counsel during all stages of the proceedings before the said trial Court;

XI.

That respondent is informed and believes that petitioner was not deprived of any of his constitutional rights before the trial Court. [22]

Wherefore respondent prays that the petition for writ of habeas corpus filed herein be denied and the order to show cause, heretofore issued herein, be discharged.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,
Attorneys for Respondent.

RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES

Respondent respectfully suggests that there is no reason for his Honor United States Circuit Judge William Denman making an exception to the practice which he himself set forth in

Bowen vs. Johnston, 55 F. Supp. 340.

This petitioner should not be permitted to bypass the charges of the District Court of the United States for the Northern District of California. United States District Judges Louis E. Goodman, Michael J. Roche and George B. Harris of the Northern District of California have not as yet had a petition for writ of habeas corpus referred to them by the petitioner. It should be noted that United States District Judge A. F. St. Sure in case number 24885-S, referred to in Respondent's Return, granted petitioner's application for relief and it was the Circuit Court of Appeals for the Ninth Circuit which reversed Judge St. Sure and held that petitioner was not denied any of his constitutional rights and that his case did not fall within the framework of the [23] decision of the Supreme Court of the United States in

Glasser v. United States, 315 U. S. 60.

Certainly the petitioner can not complain that he has been treated unfairly by any of the District Judges of the United States for the Northern District of California.

In Bowen v. Johnston, supra,
his Honor, Judge Denman, indicated that in the absence of any extraordinary circumstances, it would in effect be an interference with the ordinary administration of justice for a Circuit Judge to entertain a petition for writ of habeas corpus before the said petitioner had sought redress before the District Judges.

Accordingly respondent respectfully suggests that his Honor Judge Denman should not have entertained this petition. Furthermore, nothing can be accomplished by relitigating the issue of the alleged denial of the effective assistance of counsel. While res judicata does not extend to a decision on habeas corpus refusing to discharge a prisoner, nevertheless no new issues are presented herein to justify the issuance of a writ as prayed for.

Swihart v. Johnston, (CCA-9), 150 F. (2d) 721, Certiorari denied, 327 U. S. 789.

The decision of the Supreme Court in

Price v. Johnston, No. 111, October term 1947, decided May 14, 1948, ... U. S. .....

affords petitioner no comfort because in the Price case the issue involved was the right of a lower Court to refuse to entertain a petition for a writ of habeas corpus on the basis of a prior denial for writ of habeas corpus where new matter was raised.

Certainly there should be a finality to judgments. Respondent concedes that the petitioner is entitled to his day in Court but he has had that day in Court—the public is entitled to its protection too.

It is obvious that no useful purpose would be

served by the issuance of a writ of habeas corpus in this case and accordingly it is respectfully submitted that the same should be denied.

[Endorsed]: Filed July 24, 1948. [25]

In the Ninth Judicial Circuit

Before William Denman, United States Circuit Judge of that Circuit.

No. 28210

WALTER McDONALD,

Petitioner,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Respondent.

IN HABEAS CORPUS

Denman, Circuit Judge:

Petitioner on the hearing of the order to show cause filed an amended petition, upon which the writ was issued. The Warden made his return and it was stipulated that the amended petition should be deemed petitioner's traverse to the return.

Hearing was had. The petitioner did not testify but offered in evidence the depositions of Judge Moinet, who presided at the trial on which petitioner was convicted, of United States Attorney Babcock, prosecuting him, and of George F. Cur-

ran, the attorney defending him. * Petitioner, without counsel, and Assistant United States Attorney Joseph Karesh argued the case and it was submitted.

On this evidence I find that each of the allegations of the amended petition is true and conclude that the Warden is holding the petitioner without warrant on a commitment on an invalid judgment.

OPINION

This is petitioner's third proceeding for a writ of habeas corpus. It presents a ground on which the facts were known to petitioner at the time of the filing of the prior two petitions, but concerning which petitioner "was unaware of the significance of [the] relevant facts."[1]

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* It was stipulated that the depositions were those appearing in the transcript in McDonald v. Johnston, No. 637, in the United States Supreme Court in the October Term 1946, Judge Moinet's in pages 7 to 23; Curran's at page 31, and Babcock's at page 55. Also stipulated in evidence are the letters from the Michigan State Bar at page 30, the memorandum and order of Judge St. Sure at page 73, and the opinion in the court of appeals at page 144.

[1] The parties are agreed that the only relevant prior petitions are those in McDonald v. Hudspeth, 129 F. 2d 196 (CCA 10), and McDonald v. Johnston, 157 F. 2d 275 (CCA 9). It is agreed that the case of McDonald v. Johnston, 149 F. 2d 768 was upon an entirely different issue and that McDonald v. United States, 166 F. 2d 323 is not in the nature of coram nobis, though the Sixth Circuit relies on and reaches the same conclusions as the Tenth Circuit in McDonald v. Hudspeth, supra, later considered in this opinion.

There is no clearer case showing the wisdom of the decision of the Supreme Court in Price v. Johnston, ... U. S. ....., decided May 24, 1948, in which it was said "In the second place, even if it is found that petitioner did have prior knowledge of all the facts concerning the allegation in question, it does not necessarily follow that the fourth petition should be dismissed without further opportunity to amend the pleadings or without holding a hearing. If called [27] upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of a habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief." (Emphasis supplied.)

The petitions filed in the two prior cases are a confused intermingling of allegations and attached exhibits which failed to set forth the contentions here urged. Petitioner, a layman, is one of those persons who, as stated by the Supreme Court in the Price case, "are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in habeas corpus proceedings, we cannot impose on them the same high standards of the legal art

which we might place on the members of the legal profession. Especially is this true in a case like this where the imposition of those standards would have a retroactive and prejudicial effect on the prisoner's inartistically drawn petition. Cf. Holiday v. Johnston, 313 U. S. 343, 350; Pyle v. Kansas, supra, 216; Tomkins v. Missouri, 323 U. S. 485, 487; Rice v. Olsen, 324 U. S. 786, 791-792." [28]

His petition before me was amended so that it states for the first time the later realized reasons and facts showing the failure to constitute a constitutional court for the trial in which he was convicted—particularly for the first time realizing that the duty of his attorney to tell the court the powerful interest of the attorney adverse to petitioner which made it clear that the attorney was disqualified to represent him. Once stated, the defect in the court protrudes like the "sore thumb" of colloquial speech.

I find and hold that here has been no abusive use of the writ.

The undispute facts are that petitioner, then imprisoned under another sentence, was indicted with one Barnowski on charges of violations of 12 U.S. C. 588 (C), subsections a and b, respecting the robbery of a Federal Reserve Bank. There were six counts of the indictment on which petitioner, on January 24, 1939, was tried and on January 26th sentenced to a 35-year imprisonment, later reduced to 25 years.

The indictment on which he was convicted was

returned on May 4, 1938. There was a long delay in its prosecution. On October 5, 1938, petitioner employed one Curran, an attorney, to secure immediately a writ of habeas corpus to procure a prompt trial.

Believing Curran had not made such an application and that Curran was derelict in not doing so, petitioner on November 19, 1938, filed with the grievance committee [29] of the Michigan State Bar Association charges against Curran for malpractice in failing to apply for such a writ of habeas corpus. During all the relevant times thereafter and until March 10, 1939, that is after petitioner had been convicted and sentenced, petitioner's charges against Attorney Curran were pending before the Michigan State Bar Association.

Although petitioner was entitled to believe that his charges against Curran terminated any prior relationship of attorney and client, Curran, without advising petitioner, on January 10, 1939, entered his appearance as petitioner's attorney for his defense under the indictment under which he was subsequently convicted.

However, though in so attempting to assume the representation of petitioner, Curran attempted no contact with him to prepare his defense until the night of January 23—that is the night before the case was set for trial—when petitioner was consulting with another attorney for his defense. Curran stated that he was petitioner's attorney but did not obtain the names of any witnesses from peti-

tioner. The reason he then obtained the names of no witnesses for the defense at the trial beginning the next day is apparent from his testimony that "Well, there was a little bit strained feeling between McDonald and myself at that time. We did not have an awful lot of conversation. [30] I merely informed them that I would be in court the following day, as I had filed an appearance and would have to be there."

From the above facts I infer that there was a feeling of hostility between petitioner and Attorney Curran which Attorney Curran then realized by his failure to obtain the names of petitioner's witnesses.

On the morning of January 24, 1939, before the trial commenced, the differences between attorney and client continued and Attorney Curran said to the petitioner that "I could not and would not ask to be discharged from the case, but that if he [the petitioner] wanted he could so advise the court, which he did." Curran further testified: "Q. Did the court grant his request? A. It did not."

From Curran's false statement that he "could not . . . ask to be discharged from the case," it is apparent that the layman petitioner well could feel that he was entrapped for the trial of the case through an attorney purporting to represent him where, if convicted, the petitioner would be imprisoned and unable to prosecute his charge of malpractice against his attorney and where, in the malpractice hearing, his conviction could be offered

as a justification for the failure to seek the writ of habeas corpus for a prompt trial.

In these circumstances it is obvious that it was Attorney Curran's duty to advise the court of the [31] facts, to ask to be discharged from his representation of petitioner, and to ask for a continuance of the trial of petitioner until through the court or otherwise, an attorney was appointed without any adverse interest to his client.

The evidence is clear that instead of such action by Attorney Curran he did nothing, this being the testimony of both Judge Moinet and of the prosecuting attorney, whose depositions were taken and put in evidence before me.[2]

It is thus apparent that the essential element of the relationship of attorney and client, namely, mutual trust and confidence, was glaringly absent. Obviously no client in that situation would feel himself safe in communicating to such an attorney facts which would appear at the trial tending to incriminate him, but which could be controverted. If he gave him the names of witnesses to prove an alibi he would fear that such an attorney would fail to find them. [32]

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[2] Curran's deposition states that petitioner fully stated to the court that petitioner was then proceeding against Curran in the malpractice proceeding. In accepting the statements of Judge Moinet and the United States Attorney that Curran's statement was untrue, it seems clear that Curran's false statement was because he realized the malodorous position he was in and wished to transfer the responsibility to the judge.

This interest of the attorney adverse to the client who was prosecuting him for malpractice is more marked than in the case of Glasser v. United States, 315 U. S. 60, for Glasser's attorney had an interest adverse to him merely because he represented another client in the same trial with a possible diverse defense. The failure of Glasser's attorney efficiently to represent him consisted of the condition of that attorney's mind because of his adverse interest of the other client. Here the adverse interest of the attorney infected the petitioner's mind with hostility because of the adverse interest in his attorney with respect to the charges pending against that attorney by his client and, unless the attorney had the mental skin of a rhinoceros, he then must have realized it. It is the condition of mind of attorney and client which determines the adverse interest.

On the morning of the trial on January 25th, at its beginning, the petitioner advised the court that there was a difference existing between himself and Curran. The testimony of the prosecuting attorney there present, is as follows:

"Q. Do you recall any conversation that occurred at the commencement of the trial relative to any statement made by the petitioner McDonald in court that morning?

A. I remember that when Court opened Judge Moinet asked if we were ready to proceed with the trial, and I advised him the Government was ready to proceed. I don't recall what response Mr. Cur-

ran made, but I recall that McDonald rose from his chair and said to the Court that he had been having some differences with his attorney and desired opportunity to obtain another attorney. But that was all that was said." (Emphasis supplied.)

On this Judge Moinet testified, as follows:

"Q. Was there any request made by Barnowski or McDonald or by Curran their lawyer, that you continue the case on that morning, a formal request?

A. No.

Q. Judge, what did occur in connection with Walter McDonald making some statement in Court that morning?

A. Shortly after the case was called, and, if I mistake it not, the jury was drawn and sworn, McDonald said he had some little disagreement with his attorney.

Q. Did he state the nature of that disagreement?

A. He did not; and the Court waited for some time for him to advise the Court of the nature of the difficulty. Mr. Curran said nothing and nothing further was said by McDonald or Barnowski in reference to that particular subject.

Q. So that you were never informed that morning, or at any subsequent time, as to what the nature of the alleged difficulties between Barnowski and McDonald and their counsel was?

A. I was not.

Q. Had anything been said in the Court that morning by McDonald or Curran, his attorney, to the effect that McDonald and Barnowski had filed any charges with the Bar or Bar Association of Michigan against their attorney, George Curran?

A. There was not; and I never heard of the subject until yesterday and that was from you and the United States Attorney who tried the case, Mr. Babcock." (Emphasis supplied.)

It thus appears that Judge Moinet was advised that there was a difference between attorney and client and that instead of inquiring the nature of the differences he waited for the layman petitioner to expand them. In this connection it is pertinent that Curran had told petitioner that he "could not" request a discharge, from which petitioner well could conclude that Curran had a right to continue as petitioner's attorney and that it was futile to attempt to remove him. [34]

While the court was waiting for the development of the differences between petitioner and Curran, it became more emphatically Curran's duty to advise the court fully of the circumstances and ask to be discharged from the case. Instead, as testified by Judge Moinet, "Mr. Curran said nothing," and the testimony of the United States Attorney that nothing of the kind was said.

At this time the law had not been declared as it was later in Glasser v. United States, supra, and, quite likely, had I been in Judge Moinet's position I would not have inquired and would have

waited and, in the absence of further information, would have continued with the trial with Curran as petitioner's attorney.

However, the Glasser case makes it clear that in such a situation it is the duty of the judge not to remain silent but to interrogate both attorney and client as to the nature of the differences between them. As the court there stated, at page 71, "The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances, to hold that Glasser freely, albeit tacitly, acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

If this is true of Glasser, an attorney, it is true a fortiori of petitioner, a layman. The Glasser [35] rule is an application to the case of the continuance of a disqualified counsel of the court's duty with respect to the waiver of counsel stated in Johnson v. Zerbst, 304 U. S. 458, 465,

"This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

If the judge so had attempted to ascertain the relationship of this attorney with his client, his own statement of what would have happened is apparent from his testimony, as follows: "If they had told me the real facts, if there were any real facts, I would have excused the jury and made an investigation and if I had been satisfied that their differences were of such a nature that in my opinion the counsel could not proceed fairly, solely in the interest of the defense or defendants, I would have appointed their counsel, for them, had they shown their inability to procure counsel." Had the judge so acted there necessarily would have been a substitution of attorneys and a continuance to enable the substitute attorney to conduct petitioner's defense.

From the above facts I conclude that no constitutional court had been formed for petitioner's trial under this indictment. There are three essentials to constitute such a court: the judge, the attorneys who are officers of the court, and the jury. Here, clearly, [36] there was no attorney who could give efficient aid as counsel.

This is true, even though no statement had been made to the court. Because the layman petitioner attempted to get the facts before the court but did not succeed without the aid of Attorney Curran or otherwise, does not create in the court its constitutional character. However, to this is added the failure of the court to inquire when advised that differences existed. Thus it is clearer that

petitioner was deprived of his constitutional right and that the trial and the judgment following such a trial must be declared without the jurisdiction of the court and void.

This does not mean that whenever the court at the beginning of a trial is told a dispute exists between an accused and his attorney that there must be a continuance and a substitution of another attorney. It means no more than that the judge must inquire into the nature of the dispute, as Judge Moinet says he would have done. This is what was done by the trial judge in United States v. Gutterman, 147 F. 2d 540 (CCA 2), where Judge Augustus Hand's opinion sets forth all the colloquy showing the nature of the differences between the attorney and client and upheld (Judge Frank dissenting) the trial court's continuance of the trial with that attorney. Similarly the full evidence was stated in United States v. Mitchell, 138 F. 2d 83 (CCA 2). In neither case was the difference on where the client [37] could feel that if he were convicted his attorney would be greatly aided in defending his client's malpractice proceeding against him.

The Warden contends that the Glasser case requires that, despite such disqualification, something more in the way of prejudice must be shown in the preparation for or in the conduct of the trial. In this I cannot agree. Enough may be inferred from the relationship of the client in the then pros-

ecution of his self-enforced attorney for a prior malpractice. However, further prejudice clearly appears.

On the opening of the trial, Curran had obtained the names of no witnesses for petitioner's defense. It was clearly his duty to move the court for a continuance so he could consult with these witnesses and be prepared to cross-examine the government's witnesses as the prosecution of the case developed. No self-respecting attorney for a client charged with an offense so serious that conviction meant at least a 25-year imprisonment would fail to ask for such a continuance. Yet the testimony of Judge Moinet, all of which I believe, is that Curran asked for no such continuance.

What the precise amount of prejudice this failure to procure a continuance produced, I am not required to measure, for the Glasser case states at page 75,

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart [Glasser's attorney] as counsel for Kretske is at once difficult and unnecessary. The right to have [38] the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. Cf. Snyder v. Massachusetts, 291 U. S. 97, 116; Tumey v. Ohio, 273 U. S. 510, 535; Patton v. United States, 281 U. S. 276, 292. And see McCandless v. United

States, 298 U. S. 342, 347. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. . . ." (Emphasis supplied.)

Here, concurrently with representing petitioner, was the violation of the duty of counsel to be free of an interest not only "which might diverge from those of his . . . client" but which in fact fundamentally diverged from those of his client.

In my opinion, the failure to secure a continuance was as much a denial of due process by the attorney as there was a denial of due process by the court in Powell v. Alabama, 287 U. S. 45, where the Court states at page 71 that the duty to provide counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' "

The failure of the court here to inquire into the

nature of the dispute led to such an unprepared trial. I could have ordered the petition amended to [39] add this further denial of due process to conform to this proof. However, I consider that unnecessary since it proves petitioner's contention that the absence of effective representation of counsel caused him prejudice.

The Warden contends that a court loses jurisdiction by the absence of an effective defending officer only by some positive act of the court itself. In this I disagree. The failure of the court to ascertain the nature of the attorney's adverse interest is sufficient. Further it is my opinion that if nothing had been stated to the court, it nonetheless could be shown that it had lost jurisdiction. Certainly in a habeas corpus proceeding it could be shown that the court lost jurisdicing where its defending officer had been bribed by the enemy of his client to secure his client's conviction. As stated, the attorneys, the court's officers, are as much a part of a fully constituted court as are the judge and jury.

The Warden relies strongly on the decision of the Circuit in McDonald v. Hudspeth, 129 F. 2d 196, 198. There the court found that "two days before the trial, Curran consulted petitioners [there was a co-defendant also represented by Curran] at the county jail. Their defense was discussed and Curran advised them that he would appear for them at the trial. They did not advise him that they did not desire him to represent them, although some

feeling existed between McDonald and Curran."

Here, the testimony of Curran is to the exact contrary that "There was some talk the date of the trial about my representing Mr. McDonald, and I told him at that time that I could not and would not ask to be discharged from the case, but that if he wanted he could so advise the Court, which he did. Q. Did the Court grant his request? A. It did not."

I cannot believe that if this had been found by the Tenth Circuit, it would have held that Curran did not violate his obligation to petitioner to supplement the statement of his layman client by telling the court that his client was prosecuting him for malpractice. Whether or not the malpractice charge was well founded is irrelevant. What is relevant is that petitioner did not want Curran because of the pending prosecution of that charge. Furthermore, the Tenth Circuit's opinion, in approving Curran't conduct, states (page 198), "Curran discussed the question of an appeal with petitioners. Barnowski agreed to raise the funds for the appeal from his friends and relatives. The funds not being forthcoming, the appeal was abandoned."

On the contrary, Curran's testimony before me is that he never filed a notice of appeal, although he felt the court had erred in rulings warranting the appeal. The testimony is "Q. And do you have an opinion as to whether or not they had a fair trial in the courtroom? A. It is a question of

whether my viewpoint [41] of the law coincides with the trial judge's. I may be wrong, and I wouldn't want to state on that. Q. The matter you refer to in your answer is a question of interpretation of rulings of the Court on law? A. Rulings of the Court on law." And, "Q. Did you write a letter directed to defendant Barnowski at the United States Penitentiary at Leavenworth, Kansas, under date of May 3, 1939, with a request of two hundred dollars to further finance his appeal? A. I believe I did. Q. Is it true that the legal time limit for filing of appeal expired March 18, 1939? A. I don't remember the dates that this took place. Q. Is it true that you never filed a notice of appeal in case No. 24,742? A. I believe that is right."

Curran's claimed attitude towards petitioner is that, though he was paid nothing but $25.00, it was his intent to do everything for his client. Yet, though claiming grounds for an appeal, he failed to do the simple thing of preparing one page of writing and filing a notice of appeal. By this failure it became certain that no other attorney could take an appeal and petitioner's conviction could be urged before the Michigan State Bar Association. The evidence before me does not warrant the approval of Curran's conduct given him by the Tenth Circuit.

The Warden also relies on the decision of this Ninth Circuit in McDonald v. Johnston, 157 F. 2d 275. There the court reversed the decision of

District Judge St. Sure, who had ordered the petitioner's release and return to Michigan for further proceedings. The ground [42] of the reversal is that the petition failed to state a cause for the writ. The petition was in the same confusion of intermingled allegations and incorporation of testimony as the original petition before me. Nowhere does it claim, as in the amended petition, that it was the failure of Curran to advise the court that his client was prosecuting him and that it was the failure of the court to make certain the nature of the disagreement which constituted the gravamen of the failure to create the constitutional court.

This is clearly apparent from the following statement at page 276, "McDonald relies on Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680. There the trial court, over Glasser's objection, appointed an attorney whom Glasser had employed for himself as attorney for Glasser's co-defendant, whose interests conflicted with those of Glasser. In the case at bar, Attorney Curran was employed by both defendants (McDonald and Barnowski). No attorney was appointed for either of them. It was not claimed or suggested that their interests conflicted. Hence the Glasser case has no relevancy here."

If this is what the petition before that court presented as its ground for relief, that decision is correct. The exact contrary appears in the amended petition before me. No contention is here made of a conflict of interest between petitioner

and his codefendant. As stated, the Glasser case is controlling because of a deeper adverse interest between attorney and client, a personal interest of the attorney under prosecution by his client. [43]

Respecting the order to be made on the conclusion of law that the Warden is holding the petitioner on a commitment on an invalid judgment, because the petitioner has not had a constitutional trial, petitioner contends that it should be that he be discharged absolutely from the custody of the Warden, the agent of the Attorney General. The law is clearly to the contrary. This is not a case in which it is claimed that the indictment is invalid. It still exists. Petitioner's contention is that he has never been tried on the indictment has been sustained. He fails to distinguish between jurisdiction to conduct the particular trial and the jurisdiction obtained by the court through the indictment. The latter jurisdiction remains and if the United States be so advised it may require the court to exercise its jurisdiction to conduct a trial under the indictment. Under petitioner's contention, this would be his first trial under the indictment.

That the United States has such right to try the accused where a first trial has been held without the court's jurisdiction to conduct it is apparent from the following cases, of which the leading case is In Re Bonner, 151 U. S. 240, 262. There the Court held, as is held of the judgment after the trial here, that a judgment sentencing to a state

penitentiary a man adjudged guilty of a federal offense, was without the jurisdiction of the court rendering it. The petitioner contended, as does petitioner here, that he [44] should be discharged "absolutely" because of such lack of jurisdiction to render the judgment. The Court held to the contrary and in ordering the release of the petitioner from the custody of the Warden, stated, "but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with the law upon the verdict against him."

In Robinson v. United States, 50 F. Supp. 774, Robinson, who had a life sentence for kidnapping, petitioned for the writ of habeas corpus. It was held, as here, that the judgment was invalid because there had been no trial with the effective assistance of counsel. The district court ordered Robinson returned to the Kentucky court, where the indictment was pending, for further proceedings. He was tried on that indictment and sentenced to be hanged. Robinson v. United States, 324 U. S. 282.

In King v. United States, 98 F. 2d 291, 295 (C.A.D.C.), it is held that an accused who attacks a judgment sentencing him for a term of years and has it set aside, may be again convicted and sentenced for life. There is no difference between an attack on appeal and on habeas corpus. The indictment is still there on which the trial is to be held. The same was held in McCleary v.

Hudspeth, 124 F. 2d 445, 447, a habeas corpus proceeding. See also, In Re Medlie, 134 U. S. 160, 170, where the release in the habeas corpus proceeding was delayed for ten days with notice to the Attorney General so that he would be [45] free to take further proceedings if so advised.

Whatever may have been petitioner's past record, he conducted his case here with unusual candor and intellectual integrity. During a colloquy it appeared that although he is now entitled to petition for release on parole, he was seeking release on the writ under the mistaken impression that it would be "absolute" and that he could not be retried. Attorney Karesh, who represented the Warden with ability and vigor, with his usual fairness to his opponent was careful to advise petitioner that, if petitioner succeeded before me, in all likelihood he would be retried.

ORDER OF DISCHARGE

The respondent Warden is ordered to release petitioner from his custody. This order is stayed for thirty days to enable the Attorney General to take such action with respect to further prosecution on the above indictment as he may be advised.

WILLIAM DENMAN,
United States Circuit Judge.

San Francisco, July 24, 1948.

[Endorsed]: Filed July 24, 1948. [46]

[Title of U. S. Court of Appeals and Cause.]

NOTICE OF APPEAL

Notice is hereby given that E. B. Swope, Warden of the United States Penitentiary, Alcatraz Island, California, respondent in the above-entitled proceedings, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order and opinion of the Honorable William Denman, United States Circuit Judge for the Ninth Judicial Circuit, discharging the petitioner, made and entered in the above-entitle action on July 24, 1948.

Dated August 18th, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Aug. 18, 1948. [47]

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL UNDER RULE 75(a)

E. B. Swope, Warden of the United States Penitentiary at Alcatraz, California, respondent appellant herein, hereby designates the complete record and proceedings in the above-entitled cause, including all exhibits, for inclusion in the record on appeal.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant U. S. Attorney,

Attorneys for Respondent-Appellant E. B. Swope, Warden, United States Penitentiary, Alcatraz, California.

[Endorsed]: Filed Sept. 3, 1948. [48]

Ninth Judicial Circuit of the United States

William Denman, Circuit Judge of the Ninth Circuit.

No. 28210

WALTER McDONALD,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California.

Present: Walter McDonald, in propia persona. Joseph Karesh, Esq., Assistant United States Attorney, for the Respondent.

REPORTER'S TRANSCRIPT

Tuesday, July 20, 1948
11:00 a.m.

Mr. Karesh: May I proceed, your Honor?

The Court: Very well.

Mr. Karesh: I think, your Honor, in the intest of saving expense in the printing up of a transcript we might here state the record as it now exists. There was a petition for writ of habeas corpus heretofore filed by the petitioner. An order to show cause issued, and in the order to show cause your Honor directed that the petitioner be present and the petitioner was present, at which time we filed on behalf of the respondent a return to the order to show cause.

Thereafter, the petitioner filed an amended peti-

tion for a writ of habeas corpus and it was deemed that our return to the petition for writ of habeas corpus would also be the return to the amended petition for writ of habeas corpus. It was then stipulated that the petition would be deemed as the traverse to the return to the order to show cause.

Thereafter, your Honor, after argument, issued an order directing the Clerk to prepare a writ of habeas corpus, which writ was so prepared by the Clerk. The writ was made returnable today before your Honor at 11:00 o'clock.

At this time, may it please the Court, we ask leave to file a return to the writ of habeas corpus, which merely incorporates by reference everything that was contained in the return to the order to show cause. There is paragraph 6, which mentions, your Honor, the proceedings before the Circuit Court of [50] Appeals for the Sixth Circuit in case 10581, which is incorporated by reference here.

The Court: Let me ask you, what is the purpose in incorporating this proceeding before the courts in Michigan?

Mr. Karesh: It has no real relevancy, except, if your Honor please, if we were to offer certain depositions they could be taken out of that proceeding.

The Court: I have examined this return. I wish you would take a look at it.

Mr. Karesh: I have secured a copy.

The Court: All right. Get your copy and take a look at it.

Mr. Karesh: No, I did not bring mine down but I have examined it.

The Court: Take this (handing a document to counsel). This is a copy furnished to us by the petitioner.

The Petitioner: Pardon me, please. It is not a certified copy.

The Court: That does not make any difference. At the last meeting, in order to avoid the time and expense of getting a certified copy, you offered this and it is here now. Are those the depositions that you desire to have introduced in evidence here?

Mr. Karesh: Yes. May I make this observation, your Honor: I do not think I came to the part where we will [51] incorporate into the record the stipulation of last week at the calling of the case, the stipulation that the petition will now be deemed to be the traverse to the return to the writ of habeas corpus; that is correct, isn't it, Mr. McDonld?

The Court: That is correct. That is what he agreed to the last time.

With reference to that, since you want to shorten the record, I call your attention to page 80 of the document that you have in your hand. Do you want that in evidence?

Mr. Karesh: I may say this, your Honor, that instead of referring to this document here, it would

be simpler to send it over, if the case goes up on appeal, to the Clerk of the Circuit Court of Appeals if we refer to No. 11,210, entitle Johnston v. McDonald and McDonald v. Johnston. That has the document itself.

The Court: I call your attention to page 7. Do you want the deposition of Judge Moinet?

Mr. Karesh: It is my understanding the burden of going forward is on the petitioner. He desires to offer it. We have no objection.

The Court: That deposition includes long letters of Barnowski. Are they relevant?

Mr. Karesh: That is up to Mr. McDonald.

The Court: Do you want to put in letters of Barnowski?

The Petitioner: I do not believe they are directly [52] relevant, other than to show a situation, and preferably if there is no objection, I believe they should be in.

Mr. Karesh: I have no objection, your Honor.

The Court: That means the entire deposition of Moinet.

Mr. Karesh: With the attachments.

The Court: Yes.

Mr. Karesh: May I say for the sake of the record that deposition appears at page 7 and runs through page 31. Of course, he has Exhibit B. I do not know whether, Mr. McDonald, Exhibit B was part of Mr. Moinet's deposition or was not. That goes from page 7 through page 30. Now, there is an exhibit B, Mr. McDonald, which is a

letter from the Bar Association to yourself under date of April 28, 1945, appearing at pages 30 and 31 of the transcript. Do you wish that letter in?

The Petitioner: Yes, sir.

Mr. Karesh: We have no objection to that going in and being marked Exhibit B on behalf of the petitioner.

The Court: On page 31 there is a deposition of George F. Curran and on page 55 is a deposition of John W. Babcock. Do I understand that you offer those, too?

The Petitioner: Yes, sir.

Mr. Karesh: They appear in this transcript as one exhibit.

The Court: Beginning at page 31.

Mr. Karesh: Beginning at page 31 of this transcript in No. 21110 of the United States Circuit Court of Appeals for the [53] Ninth Circuit; Mr. Curran's runs from page 31 through page 55.

The Court: Are you including all the certificates of the officers and so on?

Mr. Karesh: Yes, because that would show they are in effect accurate documents, your Honor.

The Court: Can you say duly certified, then, and save that amount of space in your record?

Mr. Karesh: It is very little, just a few lines. It runs from 31 through 55, Mr. McDonald, the deposition of Mr. Curran, and the deposition of Mr. Babcock runs from page 55 and continues from 55 through 68. Do you desire to offer those?

The Petitioner: As Exhibit C.

Mr. Karesh: I think that would be Exhibit C. one exhibit.

The Petitioner: That is correct.

Mr. Karesh: I think at this stage of the proceedings, your Honor, it should be noted that those depositions were taken in the case of McDonald v. Hudson before the District Court of Kansas, and the case was appealed and was reported in 129 Fed. 2d. 196. That is correct, isn't it?

The Petitioner: Other than that I might say the depositions were taken for the District of Kansas but were taken—

Mr. Karesh: They were taken in Detroit?

The Petitioner: That is correct.

Mr. Karesh: But were offered in those proceedings. These appear as part of the proceedings that went upon appeal in [54] McDonald v. Hudspeth, 129 Fed. 2d. 196.

Have you any other documents?

The Court: On page 73 is the memorandum and order of Judge St. Sure. Do you desire to offer that?

The Petitioner: Yes, sir.

The Court: And then on page 144 is the opinion of the Circuit Court of Appeals of the Ninth Circuit. I presume I could take judicial notice of that, but do you offer that?

The petitioner: If relevant.

Mr. Karesh: If your Honor please, if he is going to offer the memorandum, he would perforce have to offer the opinion in the entire matter.

The Court: It is a memorandum and order of Judge St. Sure, as entitled on page 73, but the whole thing is there.

Mr. Karesh: I do not think that is relevant, your Honor, because if counsel offers that opinion we could then incorporate into the record and ask that be read into the record all these other opinions. I think they have no relevancy. This is a new habeas corpus hearing in which we are taking testimony, so I would move that that be striken as having no relevancy here whatsoever.

The Petitioner: I object.

The Court: You mean the opinion of the Circuit Court of Appeals?

Mr. Karesh: I mean the memorandum of Judge St. Sure has [55] no more relevancy than the opinion of the Circuit Court of Appeals.

The Court: Then you agree there is no abusive use of the writ here?

Mr. Karesh: Oh, no, I can not concede that. I say in a habeas corpus proceeding, this is a new proceeding—

The Court: The only ground upon which there could be an abusive use of the writ would be where the same contention has been urged and so on.

Mr. Karesh: No, that is brought into the picture on the return to the order to show cause but not on the return to the writ.

The Court: There is no contention made in the

return to the order to show cause of the abusive use of the writ. Either it is here or it is not.

Mr. Karesh: Your Honor has found that there is no abusive use of the writ and that is purely within your Honor's discretion.

The Court: I have never found that there was no abusive use of the writ.

Mr. Karesh: By issuing the writ of habeas corpus, your Honor has in fact declared that there is no abuse of the writ.

The Court: I did not so hold and I do not so regard it. Do you contend that there is an abusive use of the writ here?

Mr. Karesh: Yes ,I do. [56]

The Court: Very well, then we will receive the offer of the opinion of the Circuit Court of Appeals of the Ninth Circuit, and we will take judicial notice of the decision of the Circuit Court of Appeals in 129 Fed. 2d. 196, which has been referred to by counsel heretofore.

Mr. Karesh: And does your Honor take judicial notice of the opinion of our Circuit Court which overruled Judge St. Sure?

The Petitioner: May I enter an objection to his statement, declaration, that he holds that this is an abusive use of the writ?

The Court: Yes. You object to that. You contend there is no abusive use of the writ.

The Petitioner: May I offer an additional statement with respect to that?

The Court: In due time, yes. We are getting now a record.

Mr. Karesh: Does your Honor take judicial notice of this transcript on appeal, No. 10581, United States Circuit Court of Appeals for the Sixth Circuit from the District Court, Criminal Docket 24742, Walter McDonald, Appellant, v. United States of America, Appellee?

The Court: No, for the reason that that was not a habeas corpus proceeding in which the writ could have been abused.

Mr. Karesh: Under those circumstances, then, we say [57] nothing further about that No. 10581.

The Court: Is that offered in evidence now that you have this other material in?

Mr. Karesh: No, I am not going to offer it, your Honor. Your Honor refuses to take judicial notice and there is no use to press it further.

The Court: The reason for my statement that I will not take judicial notice of it is because it is not a habeas corpus proceeding, and I understand that you do not offer it as a habeas corpus proceeding in which the writ might have been abused.

Mr. Karesh: I think your Honor is correct and we gladly abide by your Honor's ruling.

If your Honor please, we are, of course, going to have to offer as Respondent's Exhibit the minute and docket entries, the indictment and so forth, but I think before we do that the petitioner has something else he wishes to offer. If he does, he may proceed. Or perhaps at this juncture—

The Court: One moment. He has recited in his petition that he was convicted under an indictment and describes the indictment. Do you want anything further than that?

Mr. Karesh: Yes, your Honor. I feel that they should be offered as a respondent's exhibit, and we are doing it out of turn—if you will turn to page 99, if your Honor please, of the transcript in 11210, to which we have already referred— [58]

The Petitioner: I think the same rule is required in both of those.

The Court: Admitted.

Mr. Karesh: So that the record may be clear, your Honor, that exhibit was originally offered and may be found in case 23414-S. It was incorporated by reference in case 24885-S, the case which your Honor has already referred to, the case in which Judge St. Sure ordered the release of the petitioner, and so as Repsondent's Exhibit A we will offer the documents to be found on page 99 of the transcript, consisting of the indictment, which runs from page 9 through 105, the plea, 106, the documents on 107, 108, 109—

The Court: Wait a second. Do you want 107?

Mr. Karesh: Yes. In fact, we will offer the whole of Respondent's Exhibit A, which runs from page 99 through page 119. That, of course, consists of the original Respondent's Exhibit A. That was offered in 23414-S and incorporated by reference in 24885-S. You are familiar with that; that contains the indictment, docket entries, judgment,

transfer to Alcatraz, and the record of his court commitment at Alcatraz. That would be Respondent's Exhibit A.

The Petitioner: Yes.

Mr. Karesh: I may ask your Honor at this time to take judicial notice of the opinion of the Circuit Court of Appeals for the Sixth Circuit, reported in 139 Fed. 2d. 939. That is [59] the order that reduced petitioner's sentence, the order of the Circuit Court of Appeals. I trust you have no objection to that.

The Petitioner: I object.

The Court: Can't we clean up this by saying that it is stipulated that the sentence originally imposed by Judge Moinet was for 35 years, and that in subsequent proceedings it was reduced to 25 years?

Mr. Karesh: By the Circuit Court of Appeals for the Sixth Circuit, yes, your Honor, and reported in 139 Fed. 2d. 939. Is that correct?

The Court: That is correct. That is what happened, wasn't it?

The Petitioner: I do not agree exactly with that. As a matter technical, I would say yes.

The Court: Isn't it a fact that in the original sentence imposed by Judge Moinet the sentence was 35 years?

The Petitioner: That is correct.

The Court: Thereafter in proceedings had before Judge Moinet the sentence was reduced to 25 years?

The Petitioner: No, I can't agree, Judge. I was sentenced to begin that day, which really did not reduce it only about five years and three months.

Mr. Karesh: That is McDonald v. Moinet, 139 Fed. 2d. page 941. Here is what it says: [60]

"The petitioner will be entitled to the benefit of all rules and regulations and good time credits as if the valid resentence of 25 years imprisonment had been pronounced on January 26, 1939, the date of the original void sentence."

The Court: Was there any appeal from that?

Mr. Karesh: This is in the appeal.

The Court: Any certiorari on that?

The Petitioner: There was?

The Court: Was it denied?

The Petitioner: Yes, your Honor, on these grounds: the Attorney General cited before the Supreme Court that the District Court was wrong in vacating the sentence, and the Circuit Court was wrong in affirming it, and that Mr. Bent had had at that time ordered the Department of Justice and those concerned to set the sentence back to begin at the original date, as the first sentence was imposed. Therefore the petitioner had not been prejudiced, and in view of this fact, would the Supreme Court deny certiorari? But no order was issued by the authorities which set that court order back. It still stands today as a court order, and I am doing 29 years and 9 months.

The Court: Let me ask you, are you now im-

prisoned under the sentence no matter when it begins?

The Petitioner: Yes, sir. [61]

The Court: That is the only question before me.

Mr. Karesh: That is correct. I just wanted to put that in the record, if the Court please, in case perchance he might—

The Court: One moment. The assistant of the warden is here. How does the record stand with reference to the date when the prisoner's sentence begins to run, do you know?

Mr. Karesh: This is Mr. Carl Sundstrom, the record clerk of Alcatraz.

Mr. Sundstrom: Our records show Mr. McDonald's sentence began back at the original date of sentence.

Mr. Karesh: 1939.

Mr. Sundstrom: As 25 years, yes.

The Court: From 1939?

Mr. Sundstrom: Yes. That was our instructions from the Department of Justice.

Mr. Karesh: And our record will show, too, your Honor, a 25 year sentence that runs from 1939.

The Court: That is not relevant to this inquiry at any rate. If he is improperly imprisoned today, he may seek release on the basis of the claim in his petition.

Mr. Karesh: The alleged denial of the effective assistance of counsel.

(Off the record discussion.)

The Court: We have here the depositions of Moinet, Curran and Babcock. Is there any further evidence that you want [62] introduced to support your petition?

The Petitioner: I think it advisable the evidence of the petitioner himself.

The Court: What is that?

The Petitioner: The evidence of the petitioner himself.

The Court: You can submit it on the evidence of other persons and not have the testimony of yourself at all here.

The Petitioner: What has led me to this position is this point—

The Court: You have a trial now pending. You have evidence offered to support your petition.

The Petitioner: That is correct.

The Court: You are not required to testify if you do not desire. You are allowed to testify if you do desire to testify.

The Petitioner: I was going to enter an explanation—it is not so long and it is not so short—of why I changed my mind. I did not at first intend to offer my testimony, but I made a different decision. Whether wise or not I do not know. But I may offer an explanation of why and that may change the picture.

The Court: You do not have to offer an explanation. If you want to testify, you can.

Mr. Karesh: I would tell him, however, Mr. McDonald, that you are not represented by coun-

sel, but we will, of course, [63] cross examine you about any criminal record that you may have, your criminal background, if His Honor feels your criminal record is relevant, whereas if you do not take the stand, we won't go into that.

The Petitioner: Ordinarily in a criminal trial they view a criminal record as relevant, but in a habeas corpus proceeding that is not the issue and is not material, in my opinion.

The Court: As soon as you offer yourself as a witness, you may be impeached. They may impeach your testimony by showing prior criminal convictions.

Mr. Karesh: And if I may say this—I believe I can do it—I am merely explaining that to you. It was my understanding you wanted to go up on the record. I have no objection as to your taking the stand. You have your right to do that, but I want to tell you what we intend doing.

The Petitioner: I have no fear from the facts of the case if justice is administered according to the law. I am an innocent man and fear no questions, but, as you say, a previous conviction may have a direct bearing——

The Court: On whether I am to believe you or not.

The Petitioner: On the credibility of the witness. It is true I place great reliance—in fact, practically all reliance on the depositions—but when the Circuit Court reversed my case, this question arose, Walker v. Johnston. [64]

The Court: That is a matter of argument; that is not a matter of testimony.

The Petitioner: I see.

Mr. Karesh: Walker v. Johnston does not say if you hold a hearing, the petitioner has to testify.

The Petitioner: That is right. Well, I will take the fatalistic view I have always taken. I will decline to testify and stand on the evidence I have offered. I won't decline. I have not decided to act as a witness for myself.

Mr. Karesh: Then I think the case is ended.

The Court: I think there should be some argument on it.

Mr. Karesh: Does the petitioner rest?

The Petitioner: The argument——

Mr. Karesh: I mean as far as testimony is concerned, do you have any other documents or testimony?

The Petitioner: No, sir.

Mr. Karesh: May I consult the agent?

The Court: Yes.

Mr. Karesh: We have no evidence to offer. Our documents are in. Does counsel wish to argue or does he wish to leave it to Your Honor?

The Court: Let me see what I have before me: the deposition of Moinet, the deposition of Curran, the deposition of Babcock, the proceedings by reference in the case of McDonald v. Hudspeth, 129 Fed. 2d 196, and 157 Fed. 2d. 275. [65]

Mr. Karesh: The opinion of this Circuit overruling Judge St. Sure.

The Court: Yes. That is the only litigation that you desire to refer to me to?

Mr. Karesh: Yes.

The Court: Will you make any argument that you desire to make?

The Petitioner: Yes, sir.

(Thereupon the matter was argued to the Court.)

CERTIFICATE OF REPORTER

I, official reporter, certify that the foregoing transcript of 18 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ J. J. SWEENEY.

[Endorsed]: Filed Sept. 20, 1948. [66]

EXHIBIT A

The Deposition of the Honorable Edward J. Moinet, United States District Judge, Eastern District of Michigan, Southern Division, taken on behalf of the Respondent, pursuant to attached agreement, before A. W. Estabrook, shorthand reporter, and Malcolm Shaw, Deputy Clerk of the Court, duly authorized and empowered to administer oaths, on Thursday, June 26, 1941, at three

Exhibit "A"—(Continued)

o'clock p.m., in the office of the Honorable Edward J. Moinet, Federal Building, Detroit, Michigan.

Appearances: Homer Davis, Esq., Assistant United States Attorney, Topeka, Kansas, appearing on behalf of Respondent. [67]

EDWARD J. MOINET,

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Deputy Clerk of the Court, to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name, please?

A. Edward J. Moinet.

Q. Where do you reside?

A. Detroit, Michigan.

Q. What is your occupation and profession?

A. United States District Judge for the Eastern District of Michigan.

Q. How long have you been United States District Judge for the Eastern District?

A. Since June 13, 1927.

Q. And at the present time you are District Judge of that district?

A. I am one of the five.

Q. Judge, do you recall the cases of Otto Barnowski and Walter McDonald, which were tried in 1939 in your Court, wherein Barnowski and Mc-

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

Donald were charged with violation of the law, with robbery of National Banks?

A. What is the question, do I recall?

Q. Do you recall it?

A. I do; the case was tried before me.

Q. Judge, is it your custom to take notice of [68] the various cases that you try, your own personal notes? A. I do.

Q. And you have those notes here with you, do you, Judge? A. I have.

Q. Judge, without asking you detailed questions about the case, I would like to have you state in the record what your notes show in connection with the case, generally.

A. My notes show the title of the cause, and the number, and the attorneys, United States attorneys appearing for the Government and the attorney appearing for the defendants; the drawing of a jury, and the number of challenges and the names of the jurors excused; the opening statement of counsel for the Government and the opening statement of counsel for defendants; and the names of all of the witnesses sworn by the Government and for the defendants, and notes of their evidence as given.

Q. Now, Judge, do you recall, on the opening day of the trial, do you recall whether or not an attorney named George F. Curran appeared on behalf of both these men in your Court?

A. I do, and the order showed that he had entered his appearance, right in the file, there, with

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

the Clerk of the Court, as attorney for the defendants, for each defendant.

Q. Now, in connection with Mr. Curran being attorney for the two petitioners, who were the defendants in your Court on the opening morning of [69] the trial, was any request made to you, Judge, by either McDonald or Barnowski, that you appoint new counsel for them? A. There was not.

Q. Was there any request made by Barnowski or McDonald or by Curran their lawyer, that you continue the case on that morning, a formal request? A. No.

Q. Judge, what did occur in connection with Walter McDonald making some statement in Court that morning?

A. Shortly after the case was called, and, if I mistake not, the jury was drawn and sworn, McDonald said that he had some little disagreement with his attorney.

Q. Did he state the nature of that disagreement?

A. He did not; and the Court waited for some time for him to advise the Court of the nature of the difficulty. Mr. Curran said nothing and nothing further was said by McDonald or Barnowski in reference to the particular subject.

Q. So that you were never informed that morning, or at any subsequent time, as to what the nature of the alleged difficulties between Barnowski and McDonald and their counsel was?

A. I was not.

Q. Had anything been said in the Court that

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

morning by McDonald or Curran, his attorney, to the effect that McDonald and Barnowski had filed any charges with the Bar or Bar Association of Michigan against their attorney, George Curran?

A. There was not; and I never heard of the subject until yesterday and that was from you and the United States Attorney who tried the case, Mr. Babcock.

Q. Now, Judge, I believe that prior to the day of the opening of the trial of Barnowski and McDonald in Michigan, they had also been arraigned before you some time prior to that on the complaint, due to the fact that, as I understand it, Mr. Hurd, the Commissioner, was out of the state and on sickness in Florida, is that right?

A. Yes.

Q. And at that time, the time they were arraigned on that complaint, did Mr. George Curran appear before you on that hearing?

A. He appeared before me serving as a Commissioner, and that was when, that was a long time before the trial, several months before the trial.

Q. You had had no complaint, no formal written request from either Barnowski or McDonald requesting the appointment of counsel, had you, at any time? A. I had not.

Q. Now, in connection with Mr. Barnowski, on the morning that the trial opened, did Mr. Barnowski make any statement whatever to you about his difficulties, or any difficulties with Mr. Curran?

A. He did not; there was no claim made that

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

there was any difficulties between Barnowski and the counsel.

Q. So that I take it that on the morning of [71] the trial, you had no personal knowledge or other information was furnished you by anybody to the effect that there was any personal difficulties between Barnowski and his counsel Curran?

A. No, sir.

Q. And the only statement that was made in court in your presence as to any difficulties that McDonald had with Curran was, as you have already testified, the mere statement that there had been difficulties? A. Yes.

Q. No explanations were offered and no formal motion for continuance was asked at that time?

A. No.

Q. And no formal motion for appointment of new counsel was asked by either petitioner?

A. No, sir.

Q. Now, Judge Moinet, the petitioner having—

A. (Interposing). Well, wait a minute. There was no request ever made to this Court by either of the defendants or by their counsel that the government procure for them certain witnesses or subpoena and bring into Court certain witnesses. Also, Mr. Curran proceeded to try the case; the defendants swore and introduced the testimony of eight witnesses in their defense; that defense applied to both defendants as to their whereabouts upon the day in question, at or about the time it was alleged the bank was robbed, and the matter

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

was thoroughly argued to the jury, both by the government and by the defendants' counsel [72] Curran; and so far as I am able to observe Mr. Curran tried this case in a very able manner, and seemed to use his very best efforts in presenting the defense for the defendants.

Q. And during the course and progress of this trial were any complaints made to you by either defendant as to the conduct of their counsel throughout the course of the trial?

A. There was not.

Q. Was there any information given you that the defendants requested that any witnesses be subpoenaed at the expense of the government?

A. There was not, and if they had made that request and shown their inability to procure such witnesses, I would have made an order that those witnesses be subpoenaed and presented in Court at the expense of the government.

Q. And if any information had been conveyed to you on the morning that Court opened in the trial of the case to the effect that either of these petitioners had personal difficulties with his counsel or had stated to the effect that they could not proceed with that counsel, would you have granted them a continuance or at least looked into the matter with the idea of appointing new counsel for them?

A. If they had told me the real facts, if there were any real facts, I would have excused the jury and made an investigation and if I had been satis-

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

fied that their difficulties were of such a nature [73] that in my opinion the counsel could not proceed fairly, solely in the interest of the defense or defendants, I would have appointed other counsel, for them, had they shown their inability to procure counsel.

Q. And as I take it from your testimony, there was nothing whatever that was said in the Court Room that morning, and no statement made by either petitioner or by their counsel that gave you any indication or idea that any such situation existed between them and counsel? A. No, sir.

Q. Judge Moinet, in the District of Kansas, McDonald testified in substance as follows:

He testified that on the opening of this case he arose in open court in the morning and stated in substance that he had had difficulties with his counsel. That you, in answer to that question, asked Mr. Babcock if Mr. Curran appeared formally as counsel. Mr. Babcock in reply to this question, stated that Mr. Curran had formally filed his appearance. Mr. McDonald further stated that on hearing Mr. Babcock say this, then you said, 'The trial will proceed.'

Mr. McDonald then says that upon your saying that the trial will proceed, that he, the petitioner McDonald, rose and said further, in substance, to you, that he had personal difficulties with his counsel, Mr. Curran, in that he had filed, he, McDonald,

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

had filed charges with the State Bar Association of Michigan against Curran, and that he and Curran— [74] that Curran could not competently represent him, and he stated further that he then formally asked you to appoint other counsel.

Judge, did Walter McDonald make those statements to you in open court on the morning that the trial convened?

A. He positively did not. The subject was never mentioned.

Q. And the first intimation you had of any such statement is my stating it to you here?

A. Today, yes, sir.

Mr. Davis: Judge Moinet, under stipulation filed in the District of Kansas in this case, McDonald, Barnowski, and their counsel appointed in Kansas, and myself, have stipulated that they might file written interrogatories, to be asked of you at the time this deposition was taken. I will ask you questions that they have forwarded to me in pursuance of the stipulation.

Cross Examination

(Interrogatories Read by Mr. Davis.)

Q. Did you receive a letter or letters from defendants McDonald and Barnowski in cause Number 24742? A. Yes.

Q. State in detail the content.

Mr. Davis: The Government suggests that copies of the letters which you state you have received

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

be made under your supervision and that such copies be attached to the deposition in lieu of the originals.

A. Yes. Well, here they are. (Papers to counsel.) Let me say that on September 7, 1938, I received a letter from McDonald while he was confined in Milan jail, copy of which is attached.

On September 18, 1938, I received a letter from Barnowski while he was confined in Milan Jail. That was before the trial, September, 1938, a copy of which follows. On July 29, 1940, I received from Barnowski a letter from Leavenworth, Kansas, copy of which follows:

Mr. Davis: The three letters that you have mentioned and which—copies of which are now incorporated into the record, are those the only letters you have received from these petitioners, Judge?

A. They are.

Mr. Davis: The next question that the petitioners have in their list is this question:

Q. Is it true, as the court records attest, that over 125 cases were given priority over case Number 24742?

A. I don't know as to the specific number. I know that there were many criminal cases pending and many more were accumulating. These criminal cases were being tried as fast as it was possible to dispose of them according to the ordinary business of this court.

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

Mr. Davis: So that the interest of the public [76] as well as the interest of the defendants in these cases was taken into consideration by the court in disposing of the business, is that true?

A. It certainly was.

Q. Was any motion or formal pleading ever filed by either petitioner that ever came to your attention, Judge, in which they moved the Court for an immediate trial, that is, I am speaking of a formal pleading? A. No.

Q. No such pleading filed. The next question is in regard to the 125 cases. 'If so, do you approve of this preferential practice?'

Mr. Davis: To which the Government objects as incompetent, irrelevant and immaterial: no proper foundation laid for the 'preferential practice' referred to in the question.

A. There was no preferential practice; the cases were taken up in their ordinary course.

Q. 'If not, why was it permitted?' The answer is already in. Seven. Did either defendant make a statement before sentence was imposed?

A. They did not. The records show that before sentence was imposed they were asked if they had anything to say before sentence was imposed, and they said nothing.

Q. If so, state in substance. You have already answered that. Were they given an opportunity to make a statement? A. They were.

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

Q. If not, why not. I think that is answered. Eight, is it true that defendant Barnowski wrote [77] you a letter from the Detention Farm in Milan, Michigan, requesting you to appoint counsel for them?

A. I received a letter from him, as already set forth, but he made no request to appoint counsel.

Q. Did you answer that letter?

A. I don't think I did.

Q. If so, when? A. Well——

Q. Your answer was a foregone conclusion. If not, why not?

A. I referred those letters from Barnowski and from McDonald to Mr. Babcock, the Chief Assistant United States Attorney, and was advised by him that these cases would be taken up as soon as it was possible, having in mind the enormous number of cases then pending in this court, and cases prior to this case referred to.

Q. Next question: Is is true that you criticized a friend of said defendants for trying to bring their witnesses to court for them?

Mr. Davis: To which the Government objects as incompetent, irrelevant and immaterial, no basis laid.

A. It is positively not true and I never knew and I don't know now that any friend brought any witnesses to court for the defendants. There were no requests to charge presented to the court

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

on behalf of the defendants and the court gave a full and complete charge, as is usual in all criminal cases, [78] fully protecting the rights of the respondents upon trial.

Q. Judge Moinet, at the time or shortly prior to the time the case of Barnowski and McDonald was called for trial in your court had the court been engaged in a very extended case involving the Securities and Exchange Act?

A. Yes, I had been engaged in the trial of the Securities and Exchange case and it took up the time of this court for thirteen cointinuous weeks, a jury trial.

Q. And before that, Judge, had you been engaged in the trial of some litigation involving some drain proceedings? A. Yes.

Q. That were extensive in nature?

A. I have been engaged in different drain proceedings involving the validity of bonds in the sum of six or seven million dollars, in which proceedings the legality of which was challenged by the taxpayers and by the local municipal authorities, and these matters took up the time of the court for many weeks; of which some cases went to the Court of Appeals.

Q. Now, during the extended occupation of the court with these matters, the court has just referred to, at various times had the court had informal discussions with members of the United States Attorney's Office relative to criminal cases that

Exhibit "A"—(Continued)

(Deposition of Edward J. Moinet.)

might be pending in the court? A. Yes.

Q. And among those informal conferences does the court recall whether or not it had ever been called to his attention that Barnowski and McDonald were anxious or stated that they were anxious that they were anxious or might indicate that they were anxious for an early disposition of their case?

A. Yes; in their letters that they wrote they indicated that they wanted a trial, but their principal contention was that they wanted to be discharged because they hadn't been provided with a speedy trial.

Q. And as I believe the court has already testified that on the morning of the trial there was no formal motion for a continuance nor for the appointment of counsel nor was anything said in the courtroom by either petitioner or by counsel for the petitioners that would give the court any indication or intimation that these petitioners had any difficulties, serious difficulties with their counsel that would not warrant their counsel proceeding with the case?

A. No, on the contrary, there was nothing said that would lead the court to believe that their trouble was of a serious nature and not only that, but the court observed upon the trial of the case that Mr. Curran, their attorney, tried it in a very masterful manner, as a good lawyer; he protected

Exhibit "A"—(Continued)
(Deposition of Edward J. Moinet.)

their rights and the examination, cross-examination, and argument to the jury indicated to me that he used his very best efforts on behalf of the defendants.

Q. And when Mr. McDonald arose and said [80] there had been some difficulties with counsel, that was the only statement that was made to the court in open court that morning?

A. It was, at any time, in or out of court.

Q. And the court did not have then, or does not have now, except what you have been told since then, any idea of what the difficulties between McDonald and counsel were?

A. I don't even know now what the difficulties were, or are.

Q. I see. And you did not deny them the continuance because no continuance was asked for on the morning of the trial? A. No.

Mr. Davis: Thank you very much, Judge. I think that is all I need to bother you with.

EDWARD J. MOINET.

Subscribed and sworn to before me this 23rd day of July, 1941.

MALCOLM SHAW,
Deputy Clerk U. S. District Court, Eastern Dist. of Mich.

Exhibit "A"—(Continued)

(Copy)

Federal Building Detroit

September 18th, 1938.

From Otto Barnowski—5597
To Hon. Judge Moinet

Dear Sir:

I, am innocent man and a cripple, have been held at—Milan Detention Farm a period of six months for Bank Robbery. [81]

The witnesses in this case State positively that the robbers were not crippled. The evidence adduced by the—F.B.I. agents confirms this inescapable fact.

The United States District attorney possesses this indisputable evidence yet persistently and unreasonably refuses to grant my release or bring me to trial so that I may prove my innocence.

I understand it is the sole duty of the Court to set date for trial, appoint counsel where defendants are indigent, and otherwise supervise and protect the rights of that defendant when said person's rights are subject to be abused or disregarded.

I justly contend that my constitutional rights have been ruthlessly disregarded.

Therefore I appeal to the Court for instant relief from my unlawfuly restraint.

I do not present this letter as a suppliant seeking undeserved preferment or favor—But respect-

Exhibit "A"—(Continued)

fully request that you protect my rights, as you have pledged by your oath of office, and immediately release me or insist that I be given a trial.

Thus, Justice only I ask of you who has been appointed to dispense it, and whom I am sure, is broad enough to recognize the fairness of my request.

I trust that a reply will reach me at an early date.

I thank you.

Respectfully,

OTTO BARNOWSKI,
Box 1000—5597 Milan, Mich.

(Copy)

September 7, 1938.
Federal Bldg.

From W. McDonald,
Box 1000—5593, Milan, Mich.

Dear Sir:

I was arrested Mar. 28, for Bank Robbery. Of this crime I am innocent.

On May 18, the F.B.I. investigator visited me at Milan. He stated that I should look forward to favorable action within about two weeks. That was over three months ago.

I would thank you for an immediate interview

Exhibit "A"—(Continued)

so that you may advise me what to do to gain my release.

It is with great reluctance that I burden you with my individual problems. But I have no funds to employ counsel and no knowledge how to proceed in my present dilemma.

I thank you sincerely for any courtesy, you may be pleased to extend.

Respectfully,

WALTER McDONALD. [83]

(Copy)

Leavenworth, Kansas,
July 29, 1940.

Post Office Box 7
Hon. Edward Moinet
Federal Bldg.
Detroit, Michigan.

My dear Judge:

Doubtless you will be surprised at receiving this letter from me, or my assuming the privilege to write but it being a matter of life and liberty to me, I beg of you to spare me enough of your valuable time and undivided attention, to present unquestionable facts furnished by competent Federal Doctors here at Leavenworth prison to more fully aid you in understanding my case more completely in my behalf, viewing it from an unbiased stand-

Exhibit "A"—(Continued)

point, as it has not been correctly presented to you to this date.

I am certain "your honor" is too intelligent to be biased, too powerful to be intimidated, too honest to be corrupted, too sincere to be haphazard and too fair to without the truth.

I am very sure you will be more than glad to listen to my plea if you had the least idea I could show you unquestionably that I am innocent of the crime for which I am sentenced. I know I am innocent of the crime, and am sure you will feel better to have all the facts upon which I rely, which I [84] am now able to produce from the most convincing and the most reliable source.

I shall be glad to have you consider the facts as follow:

You will recall from the facts of the trial, that my conviction was based upon identification made by a lady school teacher who happened to be a customer in the bank at the time of the robbery—All the officials and employers of the bank testified the robbers were masked and this one lady said they were not, and all witnesses including this lady testified that neither of the robbers was crippled.

You will also recall the testimony of the physician Dr. Shallow who furnished evidence of my physical condition. In my opinion it was the testimony of this lady teacher, and the Doctor which caused my conviction.

I can furnish you unquestioned and competent

Exhibit "A"—(Continued)

facts by the highest class and most competent physicians in Leavenworth prison, who has stripped me, and fully examined me to their satisfaction, which facts will controvert fully the testimony of both the above mentioned witnesses. If I can do this, I will strip the whole case of all incriminating evidence against me. If these witnesses for any reason gave untrue testimony then I most assuredly should not be deprived of my liberty and freedom, and should go free.

Dr. Shallow who testified in the case regarding my physical condition among other things said I had action in my crippled knee. Absolutely, upon [85] my word and honor, did not at any time examine me in any manner sufficient to know whether I was crippled or not. My crippled condition is such that I am unable to go to meals and walk in the lines with other inmates, but I am required to enter alone in advance of the others, and to leave in advance of the others.

The rules of this institution will not permit the Doctors to give me written statements, but they advise me that they will gladly give you a full report upon your written request.

If my condition is such that I could not have walked in and out of the bank without anyone noticeing it, then the ladies identification must be a gross mistake even how honest she may be in her intentions.

Exhibit "A"—(Continued)

Now Your Honor: I am imploring you, as a dependant citizen of this great and good Government, and as a man who has has freedom taken from him on mistaken identity and erronious testimony to present to your authentic and unimpeachable statement of the facts regarding my crippled condition, as found by the best legal medical talent in the employ of the Government in Leavenworth prison. It is not new facts discovered, but true facts of which it is my first and only opportunity I have had to furnish in my behalf.

Now, your Honor: I am asking you to please reconsider my case, and in the face of these facts, I ask that you reform your judgment in keeping with this correctly derived at facts, which proves [86] beyond a reasonable doubt, that Dr. Shallow did not examine me sufficiently to determine my actual condition, and that the lady who identified me, must of necessity, be mistaken entirely in her testimony as affecting my guilt. I am sure my Government through its public servants desires me to have administered to me equal and full justice as the true facts justify, regardless of the time or under the circumstances which same is developed and presented. This being a matter of full life and liberty to me, I truly ask and pray you to communicate with the following named physicians at the U. S. penitentiary at Leavenworth, Kansas, regarding my condition as a cripple.

No time in the past ten years or more have I

Exhibit "A"—(Continued)

been able to walk without crutches or a strong walking stick as an aid to support me.

You write to Dr. John W. Cronin and Dr. Root, physicians in the hospital here. I have been advised by officials here to first write direct to you as you have full power as trial judge to reconsider my case and reform your judgment in keeping with the facts presented to you.

This will be consistent with what law and justice require.

I am yours for success and happiness.

OTTO BARNOWSKI,
54616, Leavenworth, Kansas.

P. S. Please excuse pencil, as I am not permitted to use a typewriter. [87]

State of Michigan,
County of Wayne—ss.

CERTIFICATE OF COURT STENOGRAPHER

I, A. W. Estabrook, a Court Stenographer in the County and State aforesaid, do hereby certify that the witness Edward J. Moinet, whose deposition was taken before me on behalf of Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, Respondent, in the within entitled cause, on Thursday, June 26, 1941, at the office of the Honorable Edward J. Moinet, Federal Building, Detroit, Michigan, was by the Deputy Clerk of the Court first duly sworn to testify to the truth,

Exhibit "A"—(Continued)

the whole truth and nothing but the truth in the cause aforesaid; that the testimony contained in said deposition then given by said witness was by me reduced to writing, and when completed, the said deposition was read over by him, the said witness, and subscribed by him in my presence, and that the said deposition is a true and correct transcript of the whole of the testimony so given by the said witness as aforesaid.

I do further certify that the said deposition hereto attached was taken at the time and place mentioned and described in the caption and notice contained in said deposition, and in the notice of said deposition which is hereto attached; and that said deposition was taken for the reason that the [88] said witness lives at a greater distance from the place of trial of said cause than 100 miles.

I do further certify that, it being impracticable to deliver the deposition aforesaid to the said Court with my own hand, I have sealed up the same, and herewith direct and transmit it by due course of the United States mail, to the said Court in which said cause is pending, and that said deposition has been retained in my possession since the taking thereof, and until the same was sealed up by me and delivered to said Court by United States mail as aforesaid.

I do further certify that the respondent, Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, was represented at the time

Exhibit "A"—(Continued)

of the taking of the said deposition by Homer Davis, Assistant United States Attorney for the District of Kansas, First Division, that the petitioners were not represented by counsel nor present at the time of the taking of said deposition. . .

I do further certify that I am not of counsel nor attorney for any of the parties to said cause, or related to any of them, or interested in any manner in said cause or its outcome.

A. W. ESTABROOK,

Court Stenographer, 733 Majestic Building, Detroit, Michigan.

Detroit, Michigan, July 24, 1941. [89]

CERTIFICATE OF DEPUTY CLERK

State of Michigan,
County of Wayne—ss.

I, Malcolm Shaw, do hereby certify that I am a deputy clerk of the District Court of the United States for the Eastern District of Michigan, Southern Division, and am duly authorized and empowered to administer oaths.

I further certify that on Thursday, June 26, 1941, at three o'clock p.m., in the office of the Honorable Edward J. Moinet, District Judge, Federal Building, Detroit, Michigan, personally appeared before me the said Honorable Edward J. Moinet, a witness produced on behalf of the respondent in the foregoing entitled cause; that the

Exhibit "A"—(Continued)

witness was by me first duly sworn to tell the truth, the whole truth, and nothing but the truth, in the cause of aforesaid: that the testimony then given by the said witness was reduced to writing in the presence of said witness by A. W. Estabrook, a competent court stenographer; that the said testimony was then transcribed by the said A. W. Estabrook, and the foregoing and attached twenty-five (25) typewritten sheets constitute a full, true and correct transcript of the testimony so given by the said witness as aforesaid.

I further certify that after the said testimony had been so transcribed, the same was read over by the said witness who did then and there subscribe and again make oath to the same in my presence. [90]

I further certify that I am not counsel for nor related to any of the parties to the foregoing and entitled cause, neither am I interested in the subject-matter or outcome thereof.

MALCOLM SHAW,

Deputy Clerk, United States District Court for the Eastern District of Michigan, Southern Division.

Dated at Detroit, Michigan, July, 1941.

[Endorsed]: Filed July 31, 1941. Howard F. McCue, Clerk. [91]

EXHIBIT "C"

The Depositions of George F. Curran and John W. Babcock, taken on behalf of the Respondent, pursuant to attached agreement, before Eugene Karst, a Notary Public within and for the County of Wayne and State of Michigan, on Friday, June 27, 1941, at 817 Federal Building, Detroit, Michigan.

Appearances: Homer Davis, Esq., Assistant United States Attorney, Topeka, Kansas, Appearing on behalf of Respondent.

GEORGE F. CURRAN

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. State your name, please?

A. My name is George F. Curran. [92]

Q. Where do you reside, Mr. Curran?

A. My residence, 3471 Courville Avenue, Detroit, Michigan.

Q. What is your business or profession?

A. I am an attorney, licensed to practice in the State of Michigan.

Q. And do you have offices in the City of Detroit?

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

A. My office is located at 1701 Ford Building, in the City of Detroit.

Q. And how long have you been admitted to the Bar of Michigan?

A. I have been admitted to the Bar of Michigan since August—no, since September of 1922.

Q. And you are a member of the Bar of the Supreme Court of Michigan? A. I am.

Q. And of what other courts are you a member admitted to practice in?

A. I am admitted to practice in the District Court, United States District Court.

Q. For the District of Michigan?

A. Southern Division; I was admitted in the Southern Division of the Eastern District.

Q. Do you recall the case of Walter McDonald and Otto Barnowski, which was filed in the United States District Court, the Eastern District of Michigan, No. 24,742? A. I do.

Q. Mr. Curran, when did you first know either Barnowski or McDonald—meet them?

A. I first met McDonald approximately a year before they were arrested—I knew McDonald approximately a year before he was arrested on this charge. The charge I am speaking of is the robbery of the Farmington Bank.

Q. And had you ever acted as his attorney prior to the bank robbery charge? A. I had.

Q. On more than one occasion?

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

A. On two prior occasions.

Q. On two prior occasions; and had you met—when did you first meet Barnowski, if you recall, to the best of your recollection?

A. I am not so sure, but I believe it was just prior to the issuance of the warrant in that Farmington Bank robbery.

Q. Just prior to that time. And were you employed by McDonald and Barnowski to represent them on the bank robbery charges in this district?

A. You refer to the case that was tried?

Q. I refer to the case. I will withdraw the question and ask you this question: Mr. Curran, will you state in your own words your employment by McDonald and Barnowski, and the steps you took in their case, from the first?

A. I was called and advised that Mr. McDonald was in custody of the Detroit Police Department. I contacted Mr. McDonald and arranged, or tried to arrange for his release. He was finally turned over to the Federal authorities on this robbery of the Farmington Bank. During that time I had [94] contact with Mr. McDonald and I appeared at the arraignment before Judge Moinet for him.

Q. At McDonald's request?

A. Yes. He also informed me that a friend of his, Otto Barnowski, had been arrested, and I proceeded to try and effect Barnowski's release. However, the police officers—I believe it was the State

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Police, Michigan State Police—took Otto Barnowski from the Detroit Police Department out to the Oakland County Jail at Pontiac. And there Barnowski called me through an attorney, Mr. Wilson. He had retained Mr. Wilson to get a writ of habeas corpus for him, and he also wanted me to come out there. I made two trips to Pontiac at Mr. Barnowski's request and filed—when they were just about to release him, some woman identified Barnowski and he was brought down and arraigned on the warrant in this Farmington robbery. I appeared at the arraignment in the Federal Court for him on that matter, which also I believe was before Judge Moinet.

Q. At his request?

A. At his request. I was not paid, and I dropped out of the picture; and when the case came up for trial before Judge Moinet, there was some question as to Barnowski and McDonald wanting me to appear for them.

Q. Now, pardon me, but prior to the date of the trial—we will go back to that—did you make a trip to Milan, the detention farm at Milan, to see [95] Barnowski and McDonald, prior to the time they were tried in the Federal Court here?

A. I did.

Q. Will you state the circumstances relating to that trip and the purpose of that trip?

A. I received a telegram from Walter McDon-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

ald, who was then held at Milan, Michigan, the detention farm. Mr. McDonald, in his telegram, stated to me that if I would come out there he would pay me for my trip out there. I went out there and he paid me $25 for the trip and to apply on past services. The purpose of Mr. McDonald wanting me to come out there was to try and effect an early trial of his case. He had been in custody some months at that time. He wanted me to secure a writ of habeas corpus, and so that he could receive an early trial I came in and I talked with Judge Moinet and also the District Attorney, and was advised that there were other cases, that had been pending prior to McDonald's and Barnowski's case, ahead of us, and just as soon as their case could be reached it would be tried, which they estimated at that time, I believe, was around thirty days. So I didn't secure a writ of habeas corpus, as Mr. McDonald and Barnowski wanted, because I could see as it would serve no purpose.

Q. Mr. Curran, both Mr. McDonald and Mr. Barnowski have testified in this case in Kansas, and both petitioners, in their testimony and in their petition for the writ of habeas corpus herein state in substance that the $25 they paid you on that [96] occasion was for the purpose solely of filing a writ of habeas corpus and was not for the purpose of paying your expenses out to Milan and back, or

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

for past services. What is the fact? What was the $25 for, Mr. Curran?

A. The $25 was paid for services that had been rendered and also for the trip. I have the telegram, I believe, still in my files, showing that they agreed to pay me if I would come out to Milan.

Q. If you would come out to Milan?

A. Now, I received no other compensation except the $25 for my trip to Milan—my expenses to Milan, which took a good half day.

Q. Mr. Curran, if you should be able to find that telegram in your files upon your return to your office, would you forward it to the reporter so it could be attached as Government's Exhibit 1 in this deposition?

A. I am sure I will be able to find it, and I will be glad to give it to you.

Q. Now, Mr. Curran——

A. Wait just a minute. Off the record——

(Discussion off the record.)

A. I am furnishing this on the basis that it is understood that that is not confidential communication between attorney and client, but if the Court who will pass upon these depositions should decide that it is, then it can be stricken.

Q. All right; fine. That is a good way to put it. Now, Mr. Curran, when you were at Milan, and in [97] addition to discussing the habeas corpus case or the early trial of their case, did you have an under-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

standing with McDonald and Barnowski that you would represent them when they were tried, or did they question your representing them when they were tried?

A. Well, it was understood—I can't give you—

Q. What was your understanding of the matter?

A. It was my understanding that I was to try the case, and because of the fact that I had started on the case I was not going to let them down merely because I hadn't been paid.

Q. And did you assume, from the fact that they had wired you to come to Milan and paid your expenses for coming and going, that you were still representing them? A. I did.

Q. Now, did you visit them at Milan on more than one occasion, Mr. Curran?

A. Well, now, I wouldn't say. I remember twice that I was out there, but I wouldn't say I was there three times or not.

Q. Your best recollection is you were there on two occasions?

A. Two occasions, and I may have been there three times; I wouldn't say. Of course, if the records are there, why, that is right.

Q. Yes, I appreciate that. In your appearing for McDonald and Barnowski at the arraignment and on the proceedings up to this point, had [98]

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

you discussed their case generally with them as a lawyer would with prospective clients, or clients, and discussed the merits of their defense, and so forth?

A. We had discussed the case in a general way; we hadn't gone into details as to witnesses who might be obtained. Their contention, of course, was there was not much to discuss, that they knew nothing about the robbery, and that is why I say it was discussed just in a general way, their defense.

Q. Now, Mr. Curran, when did you see these men next; that is, prior to the day they were tried? I believe the trial started in January of 1939. Did you see them shortly before the trial convened, at the County Jail?

A. I think I saw them a day or two before the trial convened, at the county jail.

Q. And will you state what conversation or arrangements you had with them at that time?

A. Well, there was a little bit strained feeling between McDonald and myself at that time. We did not have an awful lot of conversation. I merely informed them that I would be in court the following day, as I had filed an appearance and would have to be there.

Q. And when you filed your formal appearance, Mr. Curran—I believe the record will show it was on January 10th, and I believe the trial con-

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

vened on January 24th—when you filed that formal appearance, [99] was it your understanding that you were still acting as attorney for these two men?

A. It was my understanding that I was. While I hadn't been paid, I was willing to go through with it. I had gotten into the picture and I was willing to see it through.

Q. Had you been notified by either Barnowski or McDonald at any time that they did not want your services?

A. The only time that there was any mention of that directly was in Judge Moinet's courtroom the morning of the trial.

Q. Now, before we get to that point, Mr. Curran, did you ask or discuss with Barnowski and McDonald, at the county jail, before they were tried, their case, as to what witnesses they wanted, and so forth, or was any discussion had along those lines?

A. There was some discussion in general: not as to what witnesses they wanted, but in the general discussion of their case. For example, they said they couldn't—in explaining they couldn't be guilty, they said that there was a woman who operated I believe a laundry, who would testify that at the time of the robbery that they were in the laundry, or one of them was, and then the other one was supposed to have been in a garage; but I

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

don't believe the names of any particular people were mentioned. Places were mentioned more than names. [100]

Q. Now, at this time, when you talked to them in the county jail and had this discussion with them as you have related about their case, was anything said by either McDonald or Barnowski that they did not want you to represent them in the trial of the case?

A. I don't remember a thing in the county jail or prior to the trial being said to that effect.

Q. Now, Mr. Curran, state what you recall as to what conversation took place in the courtroom on the morning the trial convened.

A. On the morning the trial convened, I believed the first step was I asked for an adjournment and the Court refused to grant an adjournment. McDonald then got up and walked up to the Bench, and his conversation to the Court, or statement to the Court, was to the effect that there had been some differences between him and myself and that they had filed a complaint with the State Bar of Michigan based upon the fact that I had not obtained a writ of habeas corpus for them, which, as I said before, I didn't feel would have served any purpose, and that was the reason I didn't obtain it; and that they didn't wish me to proceed with the case. The Judge asked me if I had filed

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

an appearance and I stated I had, and the trial Judge stated that the trial would go on.

Q. Now, did you represent them throughout the trial, Mr. Curran? A. I did.

Q. Did you cause any subpoenas to be issued for [101] any witnesses in their behalf, or were any witnesses procured for them?

A. There were witnesses procured.

Q. At your instigation, or how were the witnesses procured, if you recall?

A. Well, that morning they gave me the names and addresses of three or four witnesses that they wanted, and I believe we were able to secure two of those witnesses, and the other witnesses that appeared for them appeared voluntarily.

Q. And did you argue the case, at the conclusion of the case, in their behalf? A. I did.

Q. And after the trial of the case, were you present at the time they were sentenced, if you recall?

A. No, I was not.

Q. You were not. Did you file a motion for a new trial for them? A. I did.

Q. Did you argue that motion? A. I did.

Q. Did you consult with them in regard to the filing of a motion for new trial, Mr. Curran?

A. I did.

Q. And after the motion for a new trial was overruled, did you take any steps to perfect an appeal?

A. No, I did not.

Q. You did not. Did you have any discussion with Barnowski or McDonald in regard to an appeal?

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

A. Well, there was some discussion as to appealing, but it was based upon the fact that [102] Barnowski's relatives would advance the cost and fee for the appeal, which they never did.

Q. Now, I might state, Mr. Curran, that Barnowski has testified in the case in Kansas to the effect that you secured the sum of one hundred dollars from his mother, for the purposes of perfecting an appeal. What are the facts in that regard?

A. That sum of money was paid me for the purpose of filing a motion for a new trial, and the receipt that was given to Barnowski—Barnowski's brother, I believe—will so show.

Q. Mr. Curran, had you been paid any other money for your services in defending these men in the trial?

A. Outside of the $25 which I was paid for my trip to Milan, and the hundred dollars which was paid for the motion for a new trial, I received no compensation whatsoever for any work done—the trial, consultation, any work—from Barnowski or McDonald, or anyone in their behalf.

Q. Mr. Curran, did you have any conversation with Mr. Babcock of the United States Attorney's office, or contact him in regard to securing an early trial for McDonald and Barnowski, at any time prior to the trial?

A. As I stated before, when I came back from Milan, I first checked up with the trial judge and also the District Attorney's office, Mr. Babcock,

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

through Mr. Babcock, and it was Mr. Babcock's [103] information that he was in the trial of a case at that time, criminal trial, that was pending before the Barnowski and McDonald case was pending, and there was one other case, I believe, that he had to try before the McDonald and Barnowski case was to be tried, and immediately upon the conclusion of that case, he would try the McDonald and Barnowski case.

Q. You recall whether or not the case Mr. Babcock referred to was the Securities & Exchange case that lasted some eleven weeks?

A. It was. There were a number of defendants —there were, oh, upwards of six to twelve defendants in that case. I was not interested in the case but I know that there were a number of defendants in the case.

Q. Now, Mr. Curran, in regard to the charges filed with the Michigan Bar Association against you by McDonald, will you state what the facts are in regard to that and what disposition was made of that matter?

A. Well, I filed a return—or, rather, possibly I should say a statement, showing my side of the case, and the charges were dismissed by the State Bar Association.

Q. Do you recall whether they were dismissed before the trial of the Barnowski case, or after the trial?

A. That I don't remember; I wouldn't say.

Q. Now, on the morning of the trial, when [104]

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

the trial convened before Judge Moinet, was any formal motion for continuance filed in writing?

A. There was no formal motion for continuance.

Q. Was there any formal motion filed by the petitioners for other counsel?

A. No, no motion—formal motion, written motion—was filed by anyone that morning.

Q. And you had not discussed the matter of the charges filed against you by McDonald with them prior to going into the courtroom that morning, or they had not discussed it with you, is that correct?

A. That is right.

Q. And it was your——

A. (Interposing) In regard to your question whether those charges were dismissed by the Bar Association after the trial, I am certain now that it was after; I would almost say definitely it was after the trial of this case that that happened.

Q. I see. Now, in your representing these men in the trial of this case, Mr. Curran, did you give them the benefit of your best services, in accordance with your oath as a member of the Bar of the State of Michigan?

A. I did. There were, of course, investigations that could have been accomplished had we had any money to do it, but there was no money to do anything, and I didn't advance any money for these men; but as far as services rendered, I did everything I possibly could to give them the benefit of a fair trial. [105]

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. And do you have an opinion as to whether or not they had a fair trial in the courtroom?

A. It is a question of whether my viewpoint of the law coincides with the trial judge's. I may be wrong, and I wouldn't want to state on that.

Q. The matter you refer to in your answer is a question of interpretation of rulings of the Court on law?

A. Rulings of the Court on law.

Q. But outside of the fact that the rulings did not perhaps agree with your conception of the law, were they granted a fair trial as to procedure and given a full opportunity to present their defense?

A. They were.

Mr. Davis: Now, Mr. Curran, the petitioners have filed a set of interrogatories or questions that they desire to ask of you, and I will ask those at this time. Off the record——

(Discussion off the record.)

Cross Examination

Q. The first question they desire to ask, Mr. Curran, is: Were you ever retained by McDonald or Barnowski to defend either or both of them in case No. 24,742?

A. I was never paid a retainer fee, but I was promised fees by the defendants, Barnowski and McDonald, which I was never paid, to represent them. [106]

Q. The next question is: If so, when?

A. I think my previous answer answers that question.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. By whom?

A. I still think that that is answered by the first answer.

Q. What was the agreement?

A. When I was first called by Mr. McDonald, we discussed not my representing them so much as effecting their release, because it was their contention at first that they were not guilty, and consequently they didn't anticipate a warrant being issued.

Q. What was your fee?

A. I have received no fee.

Q. When were you paid?

A. I was not paid at any time outside of the $25 for the trip to Milan and the hundred dollars for the filing of the motion for a new trial.

Q. If you were not hired by either defendant, did the Court appoint you as counsel for either or both of said defendants in cause No. 24,742?

A. No, the Court did not appoint me.

Q. If so, by what Judge were you appointed? That is already answered, I take it.

A. Yes.

Q. On what date? That is already answered.

A. Yes.

Q. Did you represent either or both defendants when arraigned on their warrant?

A. I did. [107]

Q. If so, whom did you represent?

A. Otto Barnowski and Walter McDonald.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. On what date?

A. That I can't give you. I would have to consult the court file showing the date of the arraignment, which I believe were both held before Judge Moinet. Walter McDonald was arraigned approximately a week prior to the date of the arraignment of Otto Barnowski.

Q. Were said defendants given a hearing or examination before Commissioner Stanley Hurd?

A. They were not, because they were scheduled to have an examination, but the day before the examination the District Attorney presented the facts to the United States Grand Jury and an indictment was returned, which obviated the necessity of an examination.

Q. Did you represent said defendants when arraigned on indictment 24,742?

A. At this time I can't tell you whether I was present in the court at that time or not.

Q. Was the indictment read?

A. That I don't remember.

Q. Were you requested to interview either of said defendants in the United States detention farm at Milan, Michigan? A. I was.

Q. Did you interview them? A. I did.

Q. On what date?

A. I can't give you the exact date at this time. I would think it was somewhere in the neighborhood [108] of October or November of—what year was that?

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. 1938. A. 1938.

Q. Is it true that Warden Ryan interviewed you immediately after your arrival?

A. No, I interviewed Warden Ryan because of certain accusations that were made by the prisoners as to their treatment in the prison.

Q. Is it true that Warden Ryan instructed you to warn McDonald and Barnowski that they better not get convicted or it will be too bad for them?

A. There was some discussion by the Warden that they had not been very good prisoners, and that in the event that they were convicted they could not expect the best treatment, or some such statement to that effect.

Q. State exactly of what said defendants consulted you during said interview?

A. Both defendants consulted me during that interview.

Q. Did you make any agreement with said defendants at that time? If so, of what nature?

A. That has been—I would rather answer that question because of the argument over this writ of habeas corpus, so it will be clear. We discussed the question at that time of why they were being held so long at the detention farm, and their claim was that the Government didn't have any case against them and didn't want to take time to try it. I advised them that if such was the case, that [109] we could secure a speedy trial by having a writ of habeas corpus issued, and I stated that if that was

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

the case, that I would do that. Then, as I have stated before in this examination, I consulted with the Judge and also with the District Attorney, Mr. Babcock, who informed me that just as soon as the cases that were pending prior to the defendants' cases—these defendants' cases, McDonald and Barnowski—had been disposed of, that the defendants, McDonald and Barnowski, would be tried on the indictment upon which they were then being held. I so advised them by letter, and that is the reason that no writ of habeas corpus was ever issued.

Q. The various records show that you visited said defendants at the United States detention farm at Milan, Michigan, on October 5, 1938. At any time succeeding this date, and until January 23, 1939, did you see either of said defendants or have any verbal or written intercourse, except the letter written to McDonald dated October 14, 1938, with said defendants of any nature or by any means whatsoever?

A. I believe that I saw the defendants once after that, at the detention farm, and it is my recollection that I also wrote a letter to them. Between what date is that?

Q. October 5, 1938, and January 23, 1939.

A. And I also saw the defendants at the Wayne County Jail. [110]

Q. On what date did defendant McDonald file a complaint against you before the Michigan bar?

A. That was sometime in December, I believe.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Is it true that a letter you wrote to McDonald, dated October 14, 1938, repudiating an agreement made with him on October 5, 1938, was the basis upon which his complaint before the Michigan State Bar was founded?

A. I did not repudiate any agreement with Mr. McDonald made at any time.

Q. On what date did the Michigan State Bar hear this complaint?

A. There never was any hearing on it, as far as I know.

Q. Is it true that you acted as defense counsel in the United States District Court for said complainants against you before the Michigan State Bar, while their said complaint was pending against you before the Michigan State Bar?

A. I believe that is true.

Q. On what date did you officially file with the United States Clerk, Mr. George M. Read, an appearance as defense counsel in case No. 24,742?

A. January 10th.

Q. Had you consulted either defendant about such proposed action? If so, when? By what means?

A. I had never discussed with them, any more than I ever discussed with any other client, the filing of an appearance, the formal filing of an appearance; but it was my understanding I was to represent them, and it was upon that understanding that I filed the appearance.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Did you notify said defendants of your filing said appearance? If so, when?

A. I don't believe I did.

Q. Is it true that you never had any contact with said defendants personally or in writing, except by letter of October 14th to McDonald, from October 5, 1938, until the proceeding and trial, January 23, 1939?

A. That has been answered before.

Q. When you encountered McDonald in the Wayne County Jail on the evening of January 23, 1939, was Attorney George Fitzgerald conferring with him?

A. Well, Mr. Fitzgerald was either there, or had been there, and it was based upon the fact that some friend of Mr. McDonald's had sent him in there.

Q. Is it true that McDonald stated to you at that time that you could not competently defend him because of your pending trial before the Michigan State Bar on his complaint.

A. I don't remember of any such conversation.

Q. Is it true that you advised McDonald that he would have to enter his objections to the Court?

A. There was some talk the date of the trial about my representing Mr. McDonald, and I told him at that time that I could not and would not ask [112] to be discharged from the case, but that if he wanted he could so advise the Court, which he did.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

A. Did the Court grant his request?

A. It did not.

Q. Is it true that McDonald rose a second time to protest and was ordered by the Judge to sit down? A. I don't recall that.

Q. Is it true that when the trial began of this said cause, on January 24, 1939, that you moved the Court for a postponement, so that you could prepare a proper structure of defense?

A. That is true.

Q. Was the motion granted? A. No.

Q. During your connection with this said cause, were you ever instructed by said defendants to consult any court official regarding their case? If so, by what defendant? At what time? For what purpose? A. I don't recall.

Q. How many times did you consult Prosecutor Babcock to urge an early trial of said cause?

A. I believe I only saw him twice on this case.

Q. At any time during your connections with said case, did said defendants inform you that they had witnesses to be heard in their behalf?

A. They stated that there were witnesses that could be secured.

Q. Did you file a witness praecipe with the Court for witnesses to be subpoenaed in their behalf?

A. I secured subpoenas for the Court for witnesses, [113] witnesses whom they claim could aid them in their defense.

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

Q. Were you present when the jury returned its verdict? A. I was.

Q. If so, did you poll the jury? A. No.

Q. If not, why not?

A. Because I didn't think it was necessary.

Q. Were you present when petitioners were sentenced? A. No.

Q. If so, did the Court permit either defendant to make a statement?

A. I am unable to say because I was not present.

Q. Was a statement made by either defendant?

A. I don't know.

Q. Which defendant? A. I don't know.

Q. Did you file a motion for a new trial?

A. I did.

Q. If so, on what date?

A. It was two days after the sentence, whatever date the sentence was.

Q. Was it denied? A. It was.

Q. On what date?

A. Well, the motion had been adjourned several weeks and finally was denied by the trial judge.

Q. Were you paid to file an appeal in this said cause? A. No.

Q. How much, and by whom?

A. I was paid no money by anyone to file an appeal in this cause. [114]

Q. Did defendant Barnowski's relatives pay you any money? A. They did.

Q. When, and for what purpose?

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

A. I believe it was around the 25th—they were not sentenced on the 25th?

Q. 26th of January.

A. About the 25th of January; I was paid a hundred dollars to file a motion for a new trial by Otto Barnowski's relatives.

Q. Was it denied? A. It was.

Q. Did you write a letter directed to defendant Barnowski at the United States Penitentiary at Leavenworth, Kansas, under wate of May 3, 1939, with a request of two hundred dollars to further finance his appeal? A. I believe I did.

Q. Is it true that the legal time limit for filing of appeal expired March 18, 1939?

A. I don't remember the dates that this took place.

Q. Is it true that you never filed a notice of appeal in the case No. 24,742?

A. I believe that is right.

Mr. Davis: Redirect examination.

Redirect Examination

By Mr. Davis:

Q. The reason you didn't file an appeal, Mr. Curran, as I understand your testimony, is the fact that you were not paid to do so?

A. That is right. [115]

Q. Mr. Curran, prior to the morning the case convened in January—I believe it was January 24, 1939—I believe you have stated that you had no

Exhibit "C"—(Continued)

(Deposition of George F. Curran.)

information or instructions from either defendant to withdraw as their attorney, other than the statement that was made in the courtroom, as you have testified? A. That is right.

Mr. Davis: Do you want the reporter to submit this and sign it?

Mr. Curran: I will waive my signature.

JOHN BABCOCK

was thereupon called as a witness in behalf of Respondent, and having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. Davis:

Q. State your name, please.

A. John W. Babcock.

Q. Where do you reside? A. In Detroit.

Q. What is your occupation?

A. Chief Assistant United States Attorney for the Eastern District of Michigan.

Q. And have been——

A. Since May, 1937.

Q. Did you have charge of the case of United States vs. Walter McDonald and Otto Barnowski, No. 24742? A. I did.

Q. Will you state in detail the various steps in connection with the prosecution of the above named defendants?

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

A. On March 30, 1938, a complaint was filed, having been signed by an agent of the Federal Bureau of Investigation before Honorable Edward J. Moinet, United States District Judge, in the absence of the United States Commissioner, and a warrant signed for Walter McDonald by Judge Moinet. Judge Moinet at that time set April 18th as the date hearing before the United States Commissioner. On April 5, 1938, a similar complaint was filed with Judge Moinet, Special Agent Earl L. Richmond of the Federal Bureau of Investigation signing the complaint. Judge Moinet signed a warrant and Barnowski was arrested and arraigned on the warrant. And Judge Moinet also set April 18th as the date for hearing before the Commissioner.

Q. Pardon me; just one question: At the arraignment of both of these petitioners were they represented by counsel?

A. They were represented by Mr. George F. Curran.

Q. Proceed.

A. Subsequently, upon being interviewed by agents of the Federal Bureau of Investigation, and of course as to this I have no personal recollection, [117] but I am just giving the facts as appear from the reports of the Federal Bureau of Investigation in our file, the two defendants told the agents of certain evidence that might—if true, establish their innocence, and in order to permit the

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

complete investigation, with the possibility of establishing their innocence, as claimed by them, the hearings before the Commissioner were continued on April 18th to April 25th, and from April 25th to May 3, 1938.

Between April 25th and May 3, 1938, we determined that the evidence purportedly given to the Federal Bureau of Investigation agents by these two defendants, and investigated by the agents completely, was not reliable and determined to present the matter to the Grand Jury. It was presented on May 3, 1938, and an indictment voted. The indictment was returned and filed with the United States District Court of Michigan on May 4, 1938, and the two defendants arraigned on the indictment on June 10, 1938. At the time of this arraignment both defendants were represented by Mr. George F. Curran, attorney at law. The case was then held pending until January 24, 1939, when the trial commenced.

Q. In connection with the delay, or the interval of time elapsing from the return of the indictment until the trial, will you state what the condition of the docket, the criminal docket, was in this district?

A. The custom and practice among the judges [118] of the Eastern District of Michigan is to make available to the office of the United States Attorney only one judge during any given month, and this was the practice and custom in 1938 and 1939. Also it is the custom and practice in this district to ex-

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

cuse the traverse jury during the entire month of August. Consequently we had no jury here during August of 1938. The docket, by reason of our inability to obtain the services of a judge and jury to try our cases, was very crowded, with cases which were instituted for the most part prior to the date of institution of this case No. 24,742.

Q. What was the nature of some of the cases that were taking the time of your office at this time, Mr. Babcock?

A. Well, without checking our statistical records I can't give you the facts for the complete period of time, but by way of example I have a distinct memory of a case of the United States against Norman Barry and others, a case involving mail fraud, conspiracy and violation of the Securities and Exchange Act, in which case, as I recall it now, the indictment was first returned in 1935 or early in 1936, and that was one of the cases which was disposed of or rather, of which disposition was made between the spring of 1938, and the end of that year. In fact, the trial of that case began early in October—I think October 3, 1938, and the trial of that case continued until December 19, 1938.

Q. Mr. Babcock, was the case of Barnowski and [119] McDonald handled as quickly as it could be handled in this district, considering the volume of business and the interests of the public at large?

A. Very definitely it was. The investigation was completed about the time of the return of the in-

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

dictment and the case was ready for trial and was tried at the earliest possible moment consistent with the developments of the calendar, in the usual course of events.

Q. Mr. Babcock, when this case came on for trial,—I believe on January 24, 1939—will you state whether or not the petitioners, McDonald and Barnowski, appeared in court that morning with an attorney?

A. They did; they were represented by Mr. George F. Curran.

Q. Do you recall any conversation that occurred at the commencement of the trial relative to any statement made by the petitioner McDonald in court that morning?

A. I remember that when Court opened Judge Moinet asked if we were ready to proceed with the trial, and I advised him the Government was ready to proceed. I don't recall what response Mr. Curran made, but I recall that Mr. McDonald rose from his chair and said to the Court that he had been having some differences with his attorney and desired opportunity to obtain another attorney. But that was all that was said.

Q. Was a formal motion filed by either McDonald [120] or Barnowski for the appointment of other counsel? A. No, sir.

Q. Was a formal motion made by either McDonald or Barnowski or Curran, their attorney, for a continuance of the case?

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

A. No formal motion in writing. Now that you mention the matter of continuance, I do recall that Mr. Curran stated that either that very morning or the evening before the defendants had named to him several people whom they desired to have subpoenaed as witnesses, and he did request a continuance for the purpose of subpoenaing these parties as witnesses.

Q. Were those witnesses later produced in Court?

A. I do not know. The names of the parties were not given to the Court or to anyone else.

Q. Now, was the trial proceeded with then?

A. Yes, sir. Incidentally, I am very certain that no exception was taken to the Court's denial of the informal motion for continuance.

Q. Did the Government put on its evidence then? A. Yes, sir.

Q. And then did the defendants put on their evidence? A. Yes.

Q. Have witnesses appear in their behalf?

A. Oh, yes.

Q. The case was argued by both sides?

A. Yes, sir.

Q. The jury instructed? A. Yes, sir.

Q. Retired, and returned a verdict of guilty?

A. Yes, sir.

Q. Mr. Babcock, did you at any time have any conferences with Mr. George Curran, attorney for Barnowski and McDonald, prior to the date of the

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

trial, in regard to their securing an early trial in the case?

A. I remember very distinctly that I had one, and it may be possible that he might have telephoned me a few times on other occasions, but on only one occasion did he come over to the office to see me.

Q. And in that conversation did you explain the condition of the docket, as you have already testified here, to Mr. Curran?

A. I did, Mr. Curran advised me that he had been requested by Barnowski and McDonald to petition for a writ of habeas corpus to protest their detention at Milan because of the delay of the trial. I told him we, of course, would do nothing to prevent his suing out the writ of habeas corpus, but that the condition of the docket, the criminal docket, was such that the case just could not be brought on for trial, at least not at that particular moment, because at the time of our conversation the prosecution of the Norman Barry case was in progress.

Q. Now, Mr. Babcock, in connection with the morning the trial convened, did Mr. McDonald or did anybody in the courtroom state what the details [122] of the alleged differences were between McDonald and Mr. Curran to the Court?

A. No, sir.

Q. Was anything said by Mr. McDonald or Mr. Curran, or Mr. Barnowski, to the effect that they

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

had filed charges before the Michigan Bar against Mr. Curran? A. I don't recall that.

Mr. Davis: Mr. Babcock, the petitioners have filed written interrogatories to be asked of you at this time. I will ask them now.

Cross Examination

Q. Is it true that Earl Richmond had charge of the investigation in case 24,742?

A. I don't know. Mr. Richmond, one agent D. L. McCormack, and Special Agent L. K. Cook of the Federal Bureau of Investigation all participated in the investigation.

Q. When was said investigation concluded?

A. I think I should answer that by saying when the trial was over, in view of the fact that all our investigations continue constantly until the conclusion of the trial.

Q. When was Richmond transferred out of the Eastern District of Michigan?

A. I do not know.

Q. Is it true that the reason said cause was not tried according to its docket number was because all witnesses refused to identify said defendants at that time? A. That is not so. [123]

Q. Why did you refuse to permit Richmond to give said defendants the lie detector test?

A. I did not refuse.

Q. Why were 125 cases advanced to be heard at the expense of the priority enjoyed by case No. 24,742?

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

A. I do not know that 125 cases were advanced, or that any cases were advanced.

Q. Why did you have said case continued before the United States Commissioner until an indictment was returned?

A. Because the defendants, as I was advised, had requested the Federal Bureau of Investigation agents to make certain investigations which the defendants thought would establish their innocence, and both the Federal Bureau of Investigation and our office were as anxious to establish their innocence, if that was a fact, as we were to establish their guilt, if that was a fact.

Q. Did you ever talk with attorney Morris Weller about this said cause?

A. I do not recall ever having a conversation with Morris Weller or knowing the gentleman at all.

Q. If so, state in detail the substance of said conversation. That is answered, I take it, by your former answer. Did you ever have any conversation with attorney George Fitzgerald about said defendants?

A. I do not recall having a conversation with Mr. Fitzgerald about this case. [124]

Q. State the substance of said conversation. I take it that is answered by the former question?

A. That is right.

Q. Did Attorney Curran, in November, 1938, complain to you about Attorney George Fitzgerald taking active interest in securing a writ of habeas corpus for said defendants?

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

A. I do not recall that he did.

Q. State the facts concerning this conflict of interest and what part you had in it.

A. I do not recall any conflict of interest and know that I had no part in any such conflict, if any such conflict existed.

Q. Did you talk the matter over with attorney George Fitzgerald in your office?

A. I do not recall ever doing so.

Q. Did you settle this misunderstanding?

A. I certainly did not settle any misunderstanding.

Q. Did you advise Attorney Fitzgerald not to interfere in this said cause, as defendants did not have any money anyway? A. I did not.

Q. Did you receive a letter from defendant Barnowski, while he was confined in the United States detention farm at Milan, Michigan?

A. The file of our office indicates that a letter was written to me by a Barnowski on November 17, 1938.

Q. If so, why was this request ignored?

A. As I recall it, it was about this same time [125] that Mr. Curran called on me to take up the question of bringing the case on for trial, and the letter was not ignored because I felt it was answered by my conversation with his attorney.

Q. Why did you personally prevent him from obtaining his own physician to testify as to his physical deformity? A. I did not.

Exhibit "C"—(Continued)

(Deposition of John W. Babcock.)

Q. Isn't it a fact that you personally made a secret agreement with Attorney George Curran whereby he was to be present at said defendants' trial to conform to legal requirements, but to make a feeble attempt only to defend said defendants, so as to insure a conviction, regardless of what methods he "choose" to employ? A. It is not.

Redirect Examination

My Mr. Davis:

Q. Mr. Babcock, do you have an opinion as to whether Barnowski and McDonald had a fair trial in their case in your district?

A. I am convinced they did.

Mr. Davis: I think that is about everything. Do you want to waive your signature?

Mr. Babcock: I will waive it. [126]

State of Michigan,
County of Wayne—ss.

CERTIFICATE OF NOTARY PUBLIC

I, Eugene Karst, a Notary Public in and for said County and State aforesaid, duly commissioned and qualified, do hereby certify that the witnesses George F. Curran and John W. Babcock, whose depositions were taken before me on behalf of Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, Respondent, in the within entitled cause, on Friday, June 27, 1941, at 817 Federal Building, Detroit, Wayne County,

Exhibit "C"—(Continued)

Michigan, were by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in the cause aforesaid; that the testimony contained in said depositions then given by said witnesses was by me reduced to writing, and the said depositions are true and correct transcripts of the whole of the testimony so given by the said witnesses as aforesaid.

I further certify that the signatures to said testimony were waived by counsel for the Respondent and by said witnesses.

The documents referred to in the testimony of George F. Curran was delivered to me and marked Government's Exhibit 1, and it attached hereto.

I do further certify that the said depositions hereto attached were taken at the time and place mentioned and described in the caption and notice [127] contained in said depositions and the notice of said depositions which is hereto attached; and that said depositions were taken for the reason that the said witnesses live at a greater distance from the place of trial of said cause than 100 miles.

I do further certify that, it being impracticable to deliver the depositions aforesaid to the said Court with my own hand, I have sealed up the same and herewith direct and transmit it by due course of the United States mail, to the said Court in which said cause is pending, and that said depositions have been retained in my possession since the taking thereof, and until the same were sealed up by me and delivered to said Court by United States mail as aforesaid.

Exhibit "C"—(Continued)

I do further certify that the respondent, Robert H. Hudspeth, Warden, United States Penitentiary, Leavenworth, Kansas, was represented at the time of the taking of the said depositions by Homer Davis, Assistant United States Attorney for the District of Kansas, First Division; and that petitioners Walter McDonald and Otto Barnowski were not represented by counsel nor present at the time of the taking of said depositions.

I do further certify that I am not of counsel nor attorney for any of the parties to said cause, or related to any of them, or interested in any manner in said cause or its outcome.

In Witness Whereof, I have hereunto set my [128] hand and seal at Detroit, County of Wayne and State of Michigan, this 7th day of July, A.D. 1941.

EUGENE KARST,

Notary Public, Wayne County, Michigan. My commission expires Jan. 17, 1944.

[Endorsed]: Filed June 13, 1945. C. W. Calbreath, Clerk. [129]

RESPONDENT'S EXHIBIT "A"

Vio: Title 12, Sec. 588 (B) a, (b), USC, Banking Act of 1935, as amended.

United States of America, in the District Court of the United States for the Eastern District of Michigan, Southern Division

Of the March Term, A. D., 1938

CR-24742

Eastern District of Michigan,
Southern Division—ss.

The Grand Jurors of the United States of America empaneled and sworn to inquire in and for the body of the Southern Division of the Eastern District of Michigan, upon their oaths present: That heretofore, on or about the 25th day of March, A. D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias [130] Otto Baranowski, late of the City of Detroit, Michigan, hereinafter referred to as defendants, did, by force and violence, and by putting in fear, unlawfully, wilfully, knowingly and feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper, officers and employees of the Farmington State Bank, a banking corporation organized and doing business under the laws of the State

Respondent's Exhibit "A"—(Continued)

of Michigan, and a member bank of the Federal Reserve System, and an insured bank in the Federal Deposit Insurance Corporation, certain monies, to-wit: the sum of five thousand eighty and 50/100 ($5,080.50) Dollars, lawful money of the United States of America, the exact denominations of the certificates, currency and coin comprising the sum aforesaid being to these Grand Jurors unknown, which said sum of money, at the time it was so robbed, stolen and taken by the defendants as aforesaid, belonged to and was in the care, custody, control, management and possession of a certain bank, to-wit: the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation, and a member bank in the Federal Reserve System; Contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

SECOND COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter [131] McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to com-

Respondent's Exhibit "A"—(Continued)

mit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly, and feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: assault, and put in jeopardy the life of Howard C. Knickerbocker, by the use of dangerous weapons, to-wit: pistols and revolvers; Contrary to the form, force and effect of the Act of Congress in such case made and provided, and against the peace and dignity of the United States.

THIRD COUNT

The Grand Jurors aforesaid, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, [132] late of the City of Detroit, Michigan, on or about the 25th day of March, A. D. 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to comfit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and

Respondent's Exhibit "A"—(Continued)

feloniously, rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: assault, and put in jeopardy the life of G. Irene Knickerbocker, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

FOURTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the [133] Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, con-

Respondent's Exhibit "A"—(Continued)

trol, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System: assault, and put in jeopardy the life of Arvale Tipper, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

FIFTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing, or in attempting to commit, the offense [134] hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously rob, steal and take from the presence of Howard C. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System; assault, and put in jeopardy the

Respondent's Exhibit "A"—(Continued)

life of Mary Elizabeth Berry, by the use of dangerous weapons, to-wit: pistols and revolvers; contrary to the form, force and effect of the Act of Congress in such case made and provided and against the peace and dignity of the United States.

SIXTH COUNT

The Grand Jurors, upon their like oaths aforesaid, do further present: That the said defendants Walter McDonald, alias Walter Lewis, alias Walter McDougal, Alias William McDonnell, alias Walter Parkins, alias Walter Perkins, and Otto Barnowski, alias Otto Burns, alias Otto Baranowski, late of the City of Detroit, Michigan, on or about the 25th day of March, A. D., 1938, in the Southern Division of the Eastern District of Michigan, and within the jurisdiction of this Honorable Court, did, in committing or in attempting to commit, the offense hereinbefore described in the first count hereof, to-wit: by force and violence, and by putting in fear unlawfully, wilfully, knowingly and feloniously, rob, [135] steal and take from the possession of Howard G. Knickerbocker, G. Irene Knickerbocker and Arvale Tipper money in the care, custody, and control, management and possession of the Farmington State Bank, an insured bank in the Federal Deposit Insurance Corporation and a member bank in the Federal Reserve System; assault, and put in jeopardy the life of Robert J. Stewart, by the use of dangerous weapons, to-wit: pistols and revolvers: Contrary to the form, force and effect of the Act

Respondent's Exhibit "A"—(Continued)

of Congress in such case made and provided and against the peace and dignity of the United States.

JOHN C. LEHR,
United States Attorney,

JOHN W. BABCOCK,
Assistant United States Attorney, Eastern District of Michigan.

United States of America, in the District Court of the United States for the Eastern District of Michigan, Southern Division.

At a Session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room, in the City of Detroit, in said District on Friday, the tenth day of June, in the year of our Lord one thousand nine hundred and thirty-eight. [136]

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

The defendant, Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias William McDonnell, alias Walter Parkins, alias Walter Perkins, being present in Court and being arraigned on the indictment heretofore filed against him,

Respondent's Exhibit "A"—(Continued)

waives the reading thereof and pleads not guilty to the charges in said indictment contained.

Thereupon the Court does now fix the bail of said defendant at the sum of $50,000.00.

EDWARD J. MOINET,
U. S. District Judge.

United States of America, in the District Court of the United States, for the Eastern District of Michigan, Southern Division.

At a Session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court Room in the City of Detroit, in said District, on Wednesday, the twenty-fifth day of January, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

In this cause, the jurors heretofore empaneled [137] and sworn, come into Court again and sit together, and after hearing the conclusion of the evidence in the case, the arguments of counsel, and the charge of the Court, retire under the charge of the officer duly sworn for that purpose to consider of their verdict to be rendered; and after being absent for a time come into Court again and say upon their oaths that defendants, Walter McDonald,

Respondent's Exhibit "A"—(Continued)

alias, and Otto Barnowski, alias, are guilty as charged.

Thereupon said jurors are excused from further consideration of this case, and the Court do now here order the sentence of said defendants deferred to tomorrow, January 26, 1939, and said defendants remanded into the custody of the United States Marshal.

EDWARD J. MOINET,
U. S. District Judge.

At a Session of the United States District Court for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room, in the City of Detroit in said District on Thursday, the twenty-sixth day of January, A.D. 1939.

Present: The Honorable Edward J. Moinet,
United States District Judge.

[Title of Cause.]

The defendant, Walter McDonald, alias, being present in Court, and being represented by [138] counsel, and having been found guilty by Jury, of the charges in said indictment contained, and now being before the Bar of the Court for sentence, and inquired of by the Court if he had anything to say why sentence should not be imposed, and the Court having fully considered all that said defendant had to say in his behalf, thereupon the Court does now sentence the said defendant, Walter McDonald, alias Walter Lewis, alias Walter McDougal, alias

Respondent's Exhibit "A"—(Continued)

William McDonnell, alias Walter Parkins, alias Walter Perkins, to be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in a Penitentiary for and during the term and period of thirty-five (35) years, beginning on the date on which he is received at the Penitentiary for service of said sentence; or if said prisoner shall be committed to a Jail or other place of detention to await transportation to the place at which his sentence is to be served, said sentence shall begin on the date on which he is received at such Jail or other place of detention.

/s/ EDWARD J. MOINET,
U. S. District Judge.

Approved as to form:

JOHN C. LEHR,
U. S. Attorney.

By JOHN W. BABCOCK,
Asst. U. S. Attorney.

[Endorsed]: Filed Jan. 26, 1939. [139]

Respondent's Exhibit "A"—(Continued)

United States of America, in the District Court of the United States for the Eastern District of Michigan, Southern Division.

[Title of Cause.]

At a session of said Court held in the Federal Building in the City of Detroit, this 21st day of October, A.D. 1943.

Present: Honorable Edward J. Moinet,
United States District Judge.

In the matter above entitled, the defendant, after due and proper trial was found guilty of the charges in the indictment by verdict of jury returned January 25, 1939, and the judgment of this Court was entered January 26, 1939, committing said defendant to the custody of the Attorney General for imprisonment for the term of thirty-five years. It now appearing to the Court that said judgment and sentence was void and by Order entered upon motion of the United States Attorney has been vacated and set aside, the said defendant, Walter McDonald, is now present in Court for the purpose of re-sentence.

The said defendant, Walter McDonald, now being before the Bar of the Court for sentence, and having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court [140] Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby

Respondent's Exhibit "A"—(Continued)
committed to the custody of the Attorney General or his authorized representative consequent upon the verdict of guilty of the charges alleged in Count Two of the indictment filed herein, for the period of twenty-five (25) years from and including this day, for imprisonment in a penitentiary.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

/s/ EDWARD J. MOINET,
United States District Judge.

Approved as to form:

/s/ JOHN W. BABCOCK,
Assistant U. S. Attorney.

CRIMINAL DOCKET

Docket 24742

[Title of Cause.]

1938. Proceedings.

May 4—Indictment filed. Report of vote of Grand Jurors filed. [141]

June 10—Defendant Walter McDonald arraigned, Indictment read, pleads Not Guilty. Bond fixed $50,000.00. Remanded to custody Moinet J. Defendant Otto Barnowski arraigned. Indictment read. Pleads Not Guilty. Bond fixed at $50,000.00. Remanded to custody Moinet J.

Respondent's Exhibit "A"—(Continued)

1939.

Jan. 11—Appearance of Defendant Walter McDonald by George F. Curran, Attorney, filed. Appearance of defendant Otto Barnowski by George F. Curran, Attorney, filed.

Jan. 20—Subpoena to Mary Elizabeth Beery rtd served January 18, 1939 filed.

Jan. 24—Jury trial begins. Jurors impaneled and sworn. Witnesses sworn. Continued to Jan. 25, 1939. Moinet J.

Jan. 25—Jury trial resumed. Arguments of Counsel. Charge of the Court.

Verdict: Guilty as charged—both defendants. Sentence deferred to January 26, 1939. Defendants remanded. Moinet J.

Jan. 26—Defendant Walter McDonald sentenced to imprisonment for 35 years. Moinet J. Commitment issued.

Defendant Otto Barnowski sentenced to imprisonment for 35 years. Moinet J. Commitment issued. [142]

Jan. 27—Subpoena to Ruth McDowell returned served January 23, 1939. Subpoena to R. J. Steward returned served January 20, 1939 filed.

Subpoena to Irene Knickerbocker, Arvale Tipper and George Wallgast returned served January 20, 1939 filed.

Subpoena to Bernice Smith, retd served Jan. 23, 1939, Ann Sheridan, Alex Costage and William Ekstein returned served January 21, 1939 filed.

Respondent's Exhibit "A"—(Continued)

1939

Subpoena Duces Tecum returned served on Howard C. Knickerbocker, January 20, 1939 filed.

Jan. 28—Motion for New Trial as to Walter McDonald. Hearing February 18, 1939 filed. Motion for New Trial as to Otto Barnowski. Hearing February 13, 1939 filed.

Feb. 20—Answer of the US to Motion for New Trial filed. Hearing on Motion for New Trial continued to February 27, 1939.

Mar. 9—Commitment returned executed by delivering Defendants, Walter McDonald & Otto Barnowski, to Warden U.S. Penitentiary, Leavenworth, Kansas, March 3, 1939, filed.

Mar. 13—Order denying Motions for New Trial entered Moinet J.

June 30—Affidavit of Otto Barnowski filed. Certified copies issued. [143]

July 5—Affidavit of Walter McDonald. Certified copies issued.

Oct. 5—Praecipe for certified copies filed, copies issued.

1943.

Jan. 13—Verified Motion for Vacation of Erroneous and Void Sentence of Walter McDonald filed.

June 12—Order Denying Motions of Walter McDonald for vacation of Erroneous and Void Sentence filed and entered. Moinet J. Book 75, Page 234.

Respondent's Exhibit "A"—(Continued)

1943

June 14—Petition for Writ of Habeas Corpus ad Prosequendum filed. Order allowing writ to be issued entered. Moinet J. Book 75, Page 269.

Writ of Habeas Corpus Ad Prosequendum issued.

June 30—Petition of Habeas Corpus Ad Prosequendum filed. Order allowing writ to be issued entered. Moinet J. Book 76, Page 146.

Writ of Habeas Corpus Ad Prosequendum issued.

July 15—Defendants Response to Government's Petion to vacate Judgment, etc. filed.

Aug. 2—Petition of Walter McDonald to vacate Judgment heard in part and continued without date. Defendant waives counsel at this hearing. Moinet J. [144]

Oct. 14—Certified copies of order of C.C.A. directing clerk to file a transcript of Record filed. Moinet J. Book 80, Page 247.

Oct. 21—Order to set aside Sentence of Walter McDonald filed and entered. Moinet J.
Defendant Walter McDonald sentenced to imprisonment under Count 2, for 25 years. Moinet J. Book 80, Page 461.
Commitment issued.

Oct. 29—Praecipe for additions to Transcript of Record filed.

Respondent's Exhibit "A"—(Continued)

1943.

Dec. 7—Writ of Habeas Corpus Ad Prosequendum returned and filed.
Commitment for Walter McDonald returned an filed.

1944.

Feb. 16.—Mandate and Opinion on appeal of Walter McDonald filed. Moinet J. Book 85, Page 30.

Apr. 3—Petition for Writ of Habeas Corpus Ad Prosequendum filed. Order allowing to be issued entered. Moinet J.
Writ of Habeas Corpus Ad Prosequendum issued for Otto Barnowski—Returnable.

Apr. 13—Hearing on Petition of Otto Baranowski to reduce sentence, Continued to Apr. 20, 1944, so that defendant may secure counsel. Moinet J. [145]

Apr. 20—Hearing on Petition of Otto Baranowski to reduce sentence continued to Apr. 25, 1944. Moinet J.
Order appointing Hugh Francis, Counsel for Otto Barnowski entered. Moinet J. Book ...., Page .....

Apr. 25—Motion for Otto Barnowski for correction of sentence filed.
Order setting aside former sentence of Otto Barnowski of Jan. 26, 1939, and sentencing defendant to imprisonment for 25 years to begin on Jan. 26, 1939. Moinet J. Book 87, Page 458.

Respondent's Exhibit "A"—(Continued)

1944

May 2—Writ of Habeas Corpus Ad Prosequendum filed and entered.

United States of America,
Eastern District of Michigan—ss.

I, George M. Read, Clerk of the United States District Court in and for the Eastern District of Michigan, do hereby certify that the annexed and foregoing is a true and full copy of the original Indictment, Plea, Verdict, Sentences (2) Docket Entries in the Matter of the United States of America vs. Walter McDonald, et al. Criminal Docket No. 24742 now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto [146] subscribed my name and affixed the seal of the aforesaid Court at Detroit, Michigan, this 22nd day of June, A.D. 1944.

(Seal) GEORGE M. READ,
Clerk.

ELEANOR VAN LOON,
Deputy Clerk.

Respondent's Exhibit "A"—(Continued)

Department of Justice
Washington

23414

May 15, 1943

To the Warden, U. S. Penitentiary, Leavenworth, Kansas:

Whereas, in accordance with the authority contained in title 18, sections 744b and 753f, U. S. Code, the Attorney General by the Director of the Bureau of Prisons has ordered the transfer of Walter McDonald, No. 54615, from the U. S. Penitentiary, Leavenworth, Kansas, to the U. S. Penitentiary, Alcatraz, California.

Now, Therefore, you, the above-named officer, are hereby authorized and directed to execute this order by causing the removal of said prisoner, together with the original writ of commitment and other official papers as above ordered and to incur the necessary expense and include it in your regular accounts.

And you, the warden, superintendent, or official [147] in charge of the institution in which the prisoner is now confined, are hereby authorized to deliver the prisoner in accordance with the above order; and you, the Warden, superintendent, or official in charge of the institution to which the transfer has been ordered, are hereby authorized and directed to receive the said prisoner into your custody and him to safely keep until the expiration

Respondent's Exhibit "A"—(Continued)

of his sentence or until he is otherwise discharged according to law.

By direction of the Attorney General,

JAMES V. BENNETT,
Director, Bureau of Prisons.

/s/ FRANK LOVELAND,
Acting Assistant Director.

Safer Custody

Original.—To be left at institution to which prisoner is transferred.

A True Copy.

By C. W. SUNDSTROM,
Record Clerk, USP,
Alcatraz, Calif.

June 19, 1944. [148]

(Copy)

23414

Record of Court Commitment
Department of Justice

Penal and Correctional Institutions
United States Penitentiary
Alcatraz, California

Inst. Name: Walter McDonald. No. 602-AZ. Born 10-1-90. Age 53.

Alias Walter McDougal, William McDonnell, Walter Perkins. Color: Indian.

True Name: Inst. name.

Respondent's Exhibit "A"—(Continued)

Name and number of prior commitments to Fed. inst.: 54615-Leavenworth (same offense).

Offense: National Bank Robbery—armed.

District: E-D-Michigan-Detroit.

Sentence: 25 years.

Costs, Fine: None.

Sentence changed: Oct. 21, 1943. New term 25 Yrs. Sentence changed to 25 yrs. by reason therefor new judg. & commitm't.

Sentenced: Jan. 26, 1939 (Original). Oct. 21, 1943 (Re-sentenced).

Committed to Fed. Inst.: March 3, 1939.

Sentence begins: Jan. 26, 1939.

Eligible for parole: May 25, 1947.

Eligible for conditional release with good time: Feb. 6, 1956* (With forfeit).

When arrested: March 28, 1938. [149]

Where arrested: Detroit, Michigan.

Residence: Detroit, Michigan.

Time in jail before trial: Since arrest.

Rate per mo. good time: 10. Total good time possible: 3000 days.

Eligible for con. ref. with extra good time: Sept. 29, 1955. (With credit of 130 days industrial good time.)

Forfeited good time: November 4, 1942*.

Amount forfeited: *Earned to June 1, 1944: (F) 90 days good time.

Expires full term: January 25, 1964.

Person to be notified in case of serious illness or death:

Respondent's Exhibit "A"—(Continued)

16674 USDB (Ft. Leav. (Military) Ft. Leavenworth, Kans. Name, Phillip Vincenti.

48704, State Penitentiary, Columbus, Ohio, Relation, Friend.

54458, State Penitentiary, Columbus, Ohio, Address 2709 Mt. Elliott, Detroit, Mich.

(Received at Alcatraz, May 20, 1943, in transfer from USP, Leavenworth, Kans.)

Releases and recommitments on present sentence other than parole:

3/7/41 To Ct. WHC & return.

3/27/41 to Ct. WHC & return.

7/23/43 To Ct. WHC-Detroit.

11/26/43 Returned to AZ.

3/8/39 Ohio Pen, Columbus, Ohio, Parole violation.

[Endorsed]: Filed July 5, 1944 [150]

District Court of the United States
Northern District of California

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 150 pages, numbered 1 to 150, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Walter McDonald, Petitioner, vs. W. B. Swope, Warden, U. S. Penitentiary, Alcatraz, Calif., Respondent, No. 28210,

Respondent's Exhibit "A"—(Continued)

as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $60.00 and that the said amount has been charged against the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 23rd day of September, 1948.

(Seal) C. W. CALBREATH,
Clerk. [151]

[Endorsed]: No. 12044. United States Court of Appeals for the Ninth Circuit. E. B. Swope, Warden, United States Penitentiary, Alcatraz, California, Appellant, vs. Walter McDonald, Appellee. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 23, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12044

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellant,

vs.

WALTER McDONALD,

Appellee.

STATEMENT OF POINTS TO BE RELIED ON IN APPEAL AND DESIGNATION OF CONTENTS OF RECORD TO BE PRINTED

E. B. Swope, Warden of the United States Penitentiary at Alcatraz Island, California, appellant herein, hereby designates the entire record filed with this Court as necessary for the consideration of the appeal, and the following constitute the points to be relied upon on appeal:

1. That the Honorable William Denman, United States Circuit Judge for the Ninth Circuit, should have denied the petition for writ of habeas corpus filed by appellee before him.

2. That the Honorable William Denman, United States Circuit Judge for the Ninth Circuit, erred when he ordered the appellee discharged from the custody of the appellant.

3. That the Honorable William Denman, United States Circuit Judge for the Ninth Circuit, erred when he found that the appellee had been denied

the effective assistance of counsel during the proceedings before the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, et al., criminal number 24742.

4. That the sentence imposed against appellee by the United States District Court for the Eastern District of Michigan, Southern Division, in the case of United States of America vs. Walter McDonald, et al., criminal number 24742, is a valid existing judgment presently in full force and effect and justifiable cause for the present continued detention of appellee by appellant.

Respectfully submitted,

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ JOSEPH KARESH,
Assistant United States Attorney, Attorneys for Appellant.

[Endorsed]: Filed October 20, 1948. Paul P. O'Brien, Clerk.